Supreme Court, U.S.
FILED
MAY 14 2009
OFFICE OF THE CLERK

No. 08-081418

In The
Supreme Court of the United States

CAMILLE GROSDIDIER, et al.,

Petitioners,

v.

CHAIRMAN, BROADCASTING BOARD OF GOVERNORS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

LESLIE D. ALDERMAN, III
ALDERMAN, DEVORSETZ & HORA PLLC
1025 Connecticut Ave., N.W.
Suite 615
Washington, D.C. 20036
(202) 969-8220

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Civil Service Reform Act of 1978 regulates adverse personnel actions, i.e. official actions that unfavorably alter the employment, classification or salary of federal employees. The Act provides a comprehensive set of remedies for such adverse personnel actions, including in specified circumstances review by the Merit Systems Protection Board and judicial review of the action of the Board. In *United States v. Fausto*, 484 U.S. 439 (1988), this Court held that the Act precludes judicial review of such adverse personnel actions under the Back Pay Act.

The Question Presented is: Does the Civil Service Reform Act, as the District of Columbia Circuit held, preclude judicial review under statutes other than the Civil Service Reform Act itself of "federal employee claims" generally, including claims that are neither adverse personnel actions nor otherwise covered by the Act?*

---

* A certiorari petition raising the same question presented is pending in *Filebark v. United States Dept. of Transportation*, No. 08-___.

PARTIES

The petitioners are Camille Grosdidier, Jorge Bustamante, and Carlos Martinez. They sued on behalf of a proposed class of similarly situated United States citizens who were denied promotions by the Broadcasting Board of Governors ("BBG"). The respondent is the Chairman of the Broadcasting Board of Governors, who is sued in his official capacity. BBG is an independent federal agency that administers and funds the Voice of America, the Office of Cuba Broadcasting, and other international broadcasters.

TABLE OF CONTENTS

Page

Question Presented i

Parties ii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 1

Statutes Involved 1

Statement of the Case 5

Reasons for Granting the Writ 8

I. There Is A Well Established Inter-Circuit Conflict Regarding Whether The Civil Service Reform Act Precludes Federal Employees From Bringing Actions Under Other Statutes Regarding Claims Not Involving Adverse Personnel Actions 8

II. This Inter-Circuit Conflict Involves An Important And Recurring Issue 25

Conclusion 33

Appendix

Opinion of the United States Court of Appeals for the District of Columbia Circuit, April 3, 2009 ..... 1a

Memorandum Opinion and Order of the District Court for the District of Columbia, April 22, 2008 ..... 8a

Opinion of the United States Court of Federal Claims, June 7, 2007 ..... 18a

TABLE OF AUTHORITIES

Page

CASES

Abramson v. United States, 42 Fed.Cl. 326 (1998) 19, 27

Adams v. United States, 48 Fed.Cl. 602 (2001) 19, 27

Agee v. United States, 77 Fed.Cl. 84 (2007) 20, 27

Ainslie v. United States, 55 Fed.Cl. 103 (2003) 19, 27

Bailey v. United States, 52 Fed.Cl. 105 (2002) 20

Bell v. United States, 23 Ct.Cl. 73 (1991) 19

Berry v. United States, 86 Fed.Cl. 24 (2009) 20

Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) 29

Bosco v. United States, 931 F.2d 879 (Fed. Cir. 1991) ..... *passim*

Bosco v. United States, 976 F.2d 710 (Fed. Cir. 1992) 16, 30

Bradley v. United States, 42 Fed.Cl. 333 (1998) 20, 27

Brock v. United States, 64 F.3d 1421 (9th Cir. 1995) 22

Broughton v. Courtney, 861 F.2d 639 (11th Cir. 1988) 14

Burroughs v. OPM, 784 F.2d 933 (9th Cir. 1986) 30

Carducci v. Regan, 714 F.2d 171 (D.C.Cir. 1983) 9, 13, 23, 24

TABLE OF AUTHORITIES – Continued

Page

Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir. 1990) (en banc) 28, 30

Contreras v. United States, 64 Fed.Cl. 583 (2005) 27

Contreras v. United States, 64 Fed.Cl. 587 (2005) 20

Cooper v. Kotarski, 487 U.S. 1212 (1988) 29

Crowley v. United States, 398 F.3d 1329 (Fed. Cir. 2005) 18, 30

Dugan v. Ramsay, 727 F.2d 192 (1st Cir. 1984) 9

Fausto v. United States, 791 F.2d 1554 (Fed. Cir. 1986) 30

Filebark v. United States Dept. of Transportation, 555 F.3d 1009 (D.C.Cir. 2009) ... 13, 23, 24, 27

Gallo v. United States, 529 F.3d 135 (Fed. Cir. 2008) 21

Hannon v. United States, 48 Fed.Cl. 15 (2000) ... 20, 27

Harper v. Frank, 985 F.2d 285 (6th Cir. 1993) 13, 14

Hedman v. United States, 15 Ct.Cl. 304 (1988) 19, 27

Hendrix v. Snow, 170 Fed.Appx. 68 (11th Cir. 2006) 14

Johnson v. United States, 81 Fed.Appx. 388 (2d Cir. 2003) 23

King v. United States, 81 Fed.Cl. 766 (2008) 20, 27

Lindahl v. OPM, 470 U.S. 768 (1985) 9

TABLE OF AUTHORITIES – Continued

Page

Mahtesian v. Lee, 406 F.3d 1131 (9th Cir. 2005).....22

Mangano v. United States, 529 F.3d 1243 (9th Cir. 2008).....21

Mudge v. United States, 308 F.3d 1220 (Fed Cir. 2002).....18, 24, 25, 30

Muniz v. United States, 972 F.2d 1304 (Fed. Cir. 1992).....28

Orsay v. United States Department of Justice, 289 F.3d 1125 (9th Cir. 2002).....22

Read v. United States, 254 F.3d 1064 (Fed. Cir. 2001).....21

Romero v. Brady, 764 F.Supp. 227 (D.P.R. 1991).....28

Romero v. United States, 38 F.3d 1204 (Fed. Cir 1994).....*passim*

Ryon v. O'Neill, 985 F.2d 204 (6th Cir. 1990).....14

Saul v. United States, 928 F.2d 829 (9th Cir. 1991).....23

Sawyer v. Musumeci, 1998 WL 743734 (2d Cir. 1998).....23

Scholl v. United States, 61 Fed.Cl. 322 (2004) 19, 26

Sloan v. United States, 36 Fed.Cl. 163 (1996).....19, 27

Steele v. United States, 19 F.3d 531 (10th Cir. 1994).....23

Tiltti v. Weise, 55 F.3d 596 (2d Cir. 1998).....23

Todd v. United States, 386 F.3d 1091 (Fed. Cir. 2004).....27

TABLE OF AUTHORITIES – Continued

Page

United States v. Fausto, 484 U.S. 439 (1988) ....*passim*

United States v. Hohri, 482 U.S. 64 (1987).....28

Vanderpool v. United States, 84 Fed.Cl. 66 (2008).....19, 27

Weber v. Department of Veterans Affairs, 129 S.Ct. 754 (2009).....30, 31

Whitman v. Department of Transportation, 547 U.S. 512 (2006).....*passim*

Worthington v. United States, 168 F.3d 24 (Fed. Cir. 1999).....17, 18, 19, 20, 24

Zervas v. United States, 26 Ct.Cl. 1425 (1992).....20

STATUTES

5 U.S.C. § 702 1

5 U.S.C. § 704 2

5 U.S.C. § 706 2

5 U.S.C. § 1222 5

5 U.S.C. § 2301 3

5 U.S.C. § 2302 .....5, 7

5 U.S.C. § 2302(a)(2).....2

5 U.S.C. § 2302(b) 2

5 U.S.C. § 2302(b)(6).....2

5 U.S.C. § 2302(b)(12).....3

5 U.S.C. § 3329(b) 27

TABLE OF AUTHORITIES – Continued

Page

5 U.S.C. § 7512 3
5 U.S.C. § 7513 ..... 3, 5
5 U.S.C. § 7513(d) 5
5 U.S.C. § 7701(a) 4
5 U.S.C. § 7703(a) 4, 5
5 U.S.C. § 7703(b)(1) 4
22 U.S.C. § 1474 ..... *passim*
28 U.S.C. § 540(c) 27
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 ..... 11, 12
28 U.S.C. § 1346 28
28 U.S.C. § 1346(a)(2) 18
29 U.S.C. § 1295(a)(2) 28
49 U.S.C. § 45102(b)(1) 10
Administrative Procedure Act 1, 7, 8, 28
Bankruptcy Reform Act 26
Civil Service Reform Act 2, 5, 7, 8
Employment Under Chapter 28 of Title 22 4
Fair Labor Standards Act 27
Federal Employees' Compensation Act 21
Federal Law Enforcement Pay Reform Act 27
Kiess Act 27
Law Enforcement Act 27

TABLE OF AUTHORITIES – Continued

Page

Little Tucker Act 28

Severance Pay Act 27

Tucker Act 25, 26, 27

RULES

Fed. Rule App. Pro. 35(b)(1)(B) 30

OTHER AUTHORITIES

Brief for Appellee, *Grosdidier v. Chairman, Broadcasting Board of Governors*, No. 08-5181 (D.C.Cir.) 32

Brief for Defendants-Appellees, *Johnson v. United States*, 81 Fed.Appx. 338 (2nd Cir. 2003), 2003 WL 24057791 23

Brief of Defendant-Appellee, *Mangano v. United States*, No. 05-17334 (9th Cir.), 2006 WL 2427080 23

Brief for the Respondents in Opposition, *Weber v. Department of Veterans Affairs*, No. 08-281 31

Brief of Respondent, *Whitman v. Department of Transportation* (June 6, 2005) 30

Brief for Respondent, *Whitman v. Department of Transportation*, No. 04-1131 (October 20, 2005) 11

Petition for Writ of Certiorari, *Cooper v. Kotarski*, No. 86-1813 29

TABLE OF AUTHORITIES – Continued

Page

Petition for Writ of Certiorari, *Weber v. Department of Veterans Affairs*, No. 08-281 30

Petition for Writ of Certiorari, *United States v. Fausto*, No. 86-595 29

United States v. Fausto, 1987 U.S. Trans. LEXIS 194 11

Petitioners Camille Grosdidier, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on April 3, 2009.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit, which is officially reported at 560 F.3d 495 (D.C.Cir. 2009), is set out at pp. 1a-7a of the Appendix. The April 22, 2008 Memorandum Opinion and Order of the District Court, which is not officially reported, is set out at pp. 8a-17a of the Appendix. The June 7, 2007 opinion of the Court of Federal Claims, which is reported at 77 Fed.Cl. 106 (2007), is set out at pp. 18a-29a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on April 3, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Administrative Procedure Act

Section 702 of Title 5 provides in pertinent part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency

action within the meaning of a relevant statute, is entitled to judicial review thereof."

Section 704 of Title 5 provides in pertinent part "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in court are subject to judicial review."

Section 706 of Title 5 provides in pertinent part: "The reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or not in accordance with law...."

Civil Service Reform Act

Section 2302(a)(2) of Title 5 provides in pertinent part that "[f]or purposes of this section – (A) 'personnel action' means – ... (ii) a promotion."

Section 2302(b) of Title 5 provides in pertinent part:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority –
>
> * * *
>
> (6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment ... for the purpose of improving ... the prospects of any particular person for employment;

* * *

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title....

Section 7512 of 5 U.S.C. provides in pertinent part:

This subchapter applies to –

(1) removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade

(4) a reduction in pay; and

(5) a furlough of 30 days or less ...

Section 7513 of Title 5 provides in pertinent part:

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

* * *

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

Section 7701(a) of Title 5 provides in pertinent part: "An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation."

Section 7703(a) of Title 5 provides in pertinent part: "Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision."

Section 7703(b)(1) of Title 5 provides in pertinent part that "[e]xcept as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit."

Employment Under Chapter 28 of Title 22

Section 1474 of Title 22 provides in pertinent part:

> In carrying out the provisions of this chapter, the Secretary, or any Government agency authorized to administer such provision, may –
>
> (a) employ, without regard to the civil service and classification laws, aliens within the United States and abroad for service in the United States relating to the translation or narration of colloquial speech in foreign languages or the preparation and production of foreign language programs when suitably

> qualified United States citizens are not available when job vacancies occur....

STATEMENT OF THE CASE

The Statutory Scheme

The Civil Service Reform Act of 1978 ("CSRA") codified and reorganized a number of important substantive and procedural rights of federal employees. Chapter 75 deals with adverse personnel actions taken against employees "for the efficiency of the service." Section 7513 establishes certain procedures which an agency must follow in taking a major adverse personnel action, such as a dismissal or reduction in pay. Section 7513(d) provides that any employee against whom such an action is taken may appeal to the Merit Systems Protection Board established under Chapter 12. Section 7703 authorizes judicial review of actions by the Board.

Chapter 23 of the CSRA establishes a number of prohibited personnel practices. Those prohibitions forbid, inter alia, the violation of certain merit principles, and the granting of any preference "not authorized by law." 5 U.S.C. § 2302. Employees aggrieved by asserted violations of those prohibitions may seek redress from the Office of Special Counsel, established under Chapter 12. Section 1222 of Title 5 provides that "[e]xcept [with regard to certain whistleblower claims], nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available

under a provision of statute which is outside of both this chapter and chapter 23."

Chapter 71 of the CSRA regulates labor relations at federal agencies, and requires that any collective bargaining agreement shall provide procedures for the settlement of grievances arising under that agreement. Those grievance procedures of a collective bargaining agreement ordinarily are "the exclusive administrative procedures for resolving grievances which fall within its coverage."

The filling of vacancies at the agencies administered by the Broadcasting Board of Governors is governed, inter alia, by 22 U.S.C. § 1474, which authorizes the hiring of aliens for certain positions requiring foreign language skills "when suitably qualified United States citizens are not available when job vacancies occur."

Proceedings Below

The Broadcasting Board of Governors is responsible for administering the Voice of America and several other broadcasters sponsored by the United States. The hiring of staff for positions at those agencies is governed in part by 22 U.S.C. § 1474, which permits the hiring of aliens to fill certain positions requiring foreign language skills only "when suitably qualified United States citizens are not available when job vacancies occur." The plaintiffs in this action are United States citizens and employees

of the Voice of America or the Office of Cuba Broadcasting. They allege that they were denied promotions in violation of section 1474 because, despite being suitably qualified for the positions in question, those jobs were filled by hiring aliens. The dispute in the courts below, and raised by the question presented, is whether the Civil Service Reform Act forbids this action to enforce section 1474.

Before commencing the instant litigation the plaintiffs first filed suit in the Court of Federal Claims, asserting that the Tucker Act provided redress for the asserted violation of section 1474. The Court of Federal Claims dismissed that action, holding that section 1474 could not be enforced under the Tucker Act because section 1474 is not a "money-mandating" statute. (Pet. App. 18a-28a). Plaintiffs then commenced the instant case in the District Court for the District of Columbia. The complaint sought injunctive relief and backpay under the Administrative Procedure Act.

The District Court dismissed the complaint. It reasoned that the asserted violation of section 1474 would also constitute a prohibited personnel practice under section 2302 of the CSRA. The court held that the failure to promote the plaintiffs constituted both a violation of merit principles and an impermissible preference for the alien applicants. (Pet. App. 15a-17a).

The District of Columbia Circuit affirmed on other, broader grounds. Even if, as plaintiffs argued, a violation of section 1474 was not a prohibited

personnel practice or otherwise covered by the CSRA, the court of appeals held, judicial enforcement of section 1474 under the Administrative Procedure Act was still precluded by the CSRA. The CSRA, the District of Columbia Circuit insisted, is the exclusive source of judicial review of a federal personnel decision, even when – as here – the CSRA itself contains no provision concerning judicial enforcement of the federal statute at issue. (Pet. App. 4a-7a).

REASONS FOR GRANTING THE WRIT

I. THERE IS A WELL ESTABLISHED INTER-CIRCUIT CONFLICT REGARDING WHETHER THE CIVIL SERVICE REFORM ACT PRECLUDES FEDERAL EMPLOYEES FROM BRINGING ACTIONS UNDER OTHER STATUTES REGARDING CLAIMS NOT INVOLVING ADVERSE PERSONNEL ACTIONS

(1) The enactment in 1978 of the Civil Service Reform Act has spawned three decades of litigation about the effect of that statute on the judicial remedies that federal employees enjoyed prior to 1978. The recurring question has been

> whether [a particular provision] (or the CSRA as a whole) removes the jurisdiction given to the federal courts [to hear such claims] ... or otherwise precludes employees from pursuing remedies beyond those set out in the CSRA.

Whitman v. Department of Transportation, 547 U.S. 512, 514 (2006). The courts of appeals have long disagreed about the preclusive effect of the CSRA.[1] This case presents the most important unresolved dispute about the impact of the CSRA: whether the Act precludes federal employees from pursuing non-CSRA judicial remedies for claims other than the type of adverse personnel actions covered by the Act.

"Congress' primary focus in the CSRA was on adverse actions." *Lindahl v. OPM*, 470 U.S. 768, 793 (1985). Chapter 75 of the CSRA establishes procedures for reviewing actions, such as dismissals, suspensions, or reduction in pay, taken against a federal employee because of misconduct or inadequate performance. In *United States v. Fausto*, 484 U.S. 439 (1988), this Court concluded that the CSRA precludes federal employees not authorized to obtain judicial review by Chapter 75 from instead bringing suit under the Back Pay Act to challenge such adverse personnel actions. "The CSRA established a comprehensive system for reviewing personnel action taken *against* federal employees." 484 U.S. at 455 (emphasis added). The terms of the CSRA, the Court concluded,

> combine to establish a congressional judgment that those employees should not be able to demand judicial review *for the type of personnel action covered by that chapter* [75].

484 U.S. at 446-48 (emphasis added).

---

[1] *Compare Dugan v. Ramsay*, 727 F.2d 192, 194-95 (1st Cir. 1984) (opinion by Breyer, J.) *with Carducci v. Regan*, 714 F.2d 171, 173-75 (D.C.Cir. 1983) (opinion by Scalia, J.).

Fausto left unresolved whether the CSRA also barred judicial review outside the CSRA regarding types of actions *not* "covered by that chapter." Since *Fausto* the lower courts have reached sharply conflicting conclusions about that question. Several circuits, most importantly the District of Columbia Circuit, hold that the CSRA bars judicial scrutiny under statutes other than the CSRA itself of all disputes related to federal employment, regardless of whether a particular claim is outside the scope of Chapter 75 or any other provision of the CSRA. The Federal Circuit and several others have repeatedly concluded – to the contrary – that the CSRA precludes judicial review under statutes other than the CSRA only of matters covered by the CSRA, e.g., of claims of adverse personnel actions.

That recurring question was presented, but not resolved, in *Whitman v. Department of Transportation*. In *Whitman* the plaintiff had allegedly been subjected to repeated, non-random drug tests, in violation of 49 U.S.C. § 45102(b)(1). Such treatment was not an "adverse personnel action" under the CSRA because (unlike the sort of personnel actions covered by Chapter 75) the testing did not affect Whitman's employment, grade, or pay[2] and because it

---

[2] As the government explained at the oral argument in *Whitman*,

> [I]n Bush v. Lucas, the Court specifically identified warrantless searches as an example of conduct in which an employer might engage towards its employees that would not constitute a personnel action. And we think that's good authority for the proposition

(Continued on following page)

was not based on any asserted misconduct or inadequate performance by Whitman. The government acknowledged that the drug testing did not constitute an adverse personnel action under the CSRA,[3] but urged the Court to extend the preclusion principle in *Fausto* to matters not covered by Chapter 75. The Solicitor General argued that the CSRA is the exclusive judicial remedy, not merely for adverse personnel actions, but for all "the employment claims of federal employees."[4]

This Court's decision in *Whitman*, however, did not resolve whether the preclusion rule in *Fausto* should be extended to all such employment matters affecting federal officials. The court of appeals in *Whitman* had held only that the CSRA did not itself confer jurisdiction over the claim in that case. 547 U.S. at 513-14. This Court noted that jurisdiction over "all civil actions arising under the ... laws ... of the United States" was already created by 28 U.S.C. § 1331. The dispositive issue in *Whitman* was

---

> that an allegedly unconstitutional drug test is not a personnel action. Now, if the employee had refused to take the test and had been dismissed or disciplined, that would be a personnel action.

2005 WL 3387693 at *55.

[3] As the government explained at the oral argument in *Fausto*, although a reduction in the pay of a particular employee would be a personnel action, it would fall outside the scope of Chapters 43 and 75 if imposed for reasons unrelated to misconduct or job performance, e.g., by mistake, or simply as a device to save money. 1987 U.S.Trans. LEXIS 194 at *9.

[4] Brief for Respondent, *Whitman v. Department of Transportation*, No. 04-1131, (October 20, 2005), at 14.

whether the CSRA had removed the jurisdictional grant in section 1331 or otherwise precluded employees from pursuing remedies that existed prior to the enactment of the CSRA. Because the court of appeals in *Whitman* had not addressed those issues, this Court remanded the case to permit the lower courts to do so in the first instance. 547 U.S. at 514-15.

(2) The decision of the District of Columbia Circuit in the instant case resolved the precise question that the Ninth Circuit had failed to determine in *Whitman*. The court below held that the CSRA "is the exclusive avenue for covered federal employees to bring suits challenging personnel actions." (Pet. App. 4a). Although section 1474 forbids the actions alleged by the plaintiff, "[t]he statute does nothing to affect the exclusivity of the CSRA for suits targeting personnel decisions." (Pet. App. 7a). "[T]he CSRA is the exclusive avenue for suit even if," as in the instant case, the CSRA provides no such avenue at all. (Pet. App. 5a).

The circumstances of this case pose the issue left unresolved by *Whitman* and *Fausto* – whether the CSRA precludes judicial remedies for claims that are not covered by the CSRA itself. This case does not involve an adverse personnel action within the scope of Chapter 75. The agency in this case did not alter in some unfavorable manner the circumstances of the plaintiffs' employment, such as by reducing their hours or classification; rather, the plaintiffs complain that the agency improperly denied them promotions.

The District of Columbia Circuit did not rely on the government's argument that a violation of section 1474 would be a prohibited personnel practice under Chapter 23 of the CSRA. The court of appeals held, rather, that the CSRA is the exclusive method of enforcing section 1474 even if the CSRA neither provides any method for enforcing section 1474 nor forbids the conduct prohibited by section 1474. (Pet. App. 5a-7a).

This broad view of the preclusive effect of the CSRA dates from the District of Columbia Circuit's decision in *Carducci v. Regan*, 714 F.2d 171 (D.C.Cir. 1983). (See Pet. App. 5a) That interpretation of the CSRA was also recently applied by that Circuit in *Filebark v. United States Dept. of Transportation*, 555 F.3d 1009, 1013 (D.C.Cir. 2009) ("the lack of any entitlement to judicial review in the CSRA preclude[s] litigation of an employment matter under the APA even when the complaint did not concern [a type of action covered by the CSRA]").[5]

The Sixth Circuit has given the CSRA a similarly broad preclusive effect. In *Harper v. Frank*, 985 F.2d 285 (6th Cir. 1993), the Sixth Circuit held that the CSRA precludes a claim asserting that the plaintiff was unlawfully denied a promotion.

> The direct holding of the Court in *Fausto* does not apply to [plaintiff's] complaint

[5] A certiorari petition is pending in *Filebark* raising the same question presented as the instant case.

> because the Postal Service's failure to promote her was not an adverse action under Chapter 75.... Although *Fausto's* holding relates only to attempts to obtain judicial review of adverse actions, its logic applies compellingly to claims for review of nonadverse actions.

985 F.2d at 290-91; see *Ryon v. O'Neill*, 894 F.2d 199, 204 (6th Cir. 1990) ("the structure of the CSRA indicate[s] that its [judicial] review provisions for personnel actions were intended to be exclusive").

The Eleventh Circuit also construes the CSRA to preclude all federal employment actions under statutes other than the CSRA and perhaps Title VII. *Broughton v. Courtney*, 861 F.2d 639, 643 (11th Cir. 1988) ("Congress intended the CSRA to provide an exclusive procedure for challenging federal personnel decisions"); see *Hendrix v. Snow*, 170 Fed.Appx. 68, 80 (11th Cir. 2006) ("outside of Title VII claims, both the Supreme Court and this Court have concluded generally that the CSRA provides the exclusive procedure for challenging federal personnel decisions").

(3) Four courts of appeals have rejected this broad preclusionary rule.

The Federal Circuit has repeatedly construed the CSRA, and applied the decision in *Fausto*, only to preclude judicial review under other statutes of those personnel matters that *are* covered by the CSRA itself. In *Bosco v. United States*, 931 F.2d 879 (Fed. Cir.

1991), that Circuit held that the CSRA did not bar a claim by workers who objected to agency action altering the basis on which the wages for their positions were to be calculated. The government argued that the CSRA barred such suits because the Act was "the exclusive means of appealing an unwanted personnel action." 931 F.2d at 882. The court of appeals rejected that argument, holding that the CSRA provided the exclusive remedy only for the specific types of action addressed by the CSRA.

> The Supreme Court did not rule that the CSRA provided the only means of judicial review of *any* actions affecting federal employees, but rather that it was the only means of review as to the types of adverse personnel action specifically *covered* by the CSRA: Silence as to certain employees "displays a clear congressional intent to deny the excluded employees the protections of Chapter 75 – including judicial review – *for personnel action covered by that chapter*." 484 U.S. at 447 (emphasis added). *Fausto* involved an adverse personnel action of the general *type* covered by the CSRA, but against a particular *employee* who was *not* covered. In contrast, the instant case involves a type of personnel action not covered by the CSRA.... [T]he CSRA does *not* address the transfer of positions from one pay system to another. Since the CSRA thus does not cover the action taken in the instant case, it and the holding of *Fausto* have no application here.

931 F.2d at 883 (emphasis in original). Chapter 75, the Federal Circuit noted, concerned – and thus was the exclusive remedy only for – adverse actions based on misconduct and unacceptable performance. *Id.*[6]

In *Romero v. United States*, 38 F.3d 1204 (Fed. Cir. 1994), the Federal Circuit gave a similarly narrow reading of CSRA preclusion in upholding the authority of the federal courts to entertain a claim challenging the assertedly improper withholding of funds from the paychecks of federal workers. *Romero* was an appeal from a United States district court.[7] Relying on *Fausto*, "[t]he government argue[d] that ... district courts universally have no power to determine whether a 'personnel action' by a federal employer is justified." 38 F.3d at 1211. The Federal Circuit again rejected that argument, explaining that

---

[6] The court reiterated that distinction in response to the government's petition for rehearing and suggestion for rehearing en banc.

> The Supreme Court in *Fausto* focussed on "precisely drawn provisions" with respect to Board and judicial review of adverse actions of any type within chapter 75 of the CSRA to infer a congressional judgment to preclude Board and judicial review.... 484 U.S. at 448-49.... [T]he Supreme Court grounded its holding in the peculiar context of adverse personnel actions. Such actions necessarily focus on the agency's appraisal of the misconduct of a particular employee. By contrast, reclassifications have nothing to do with appraisals of the actions of individual employees.

Bosco v. United States, 976 F.2d 710, 713-14 (Fed. Cir. 1992).

[7] See p. 28, *infra*.

"when the passage [from *Fausto*] cited by the government is read in the context of the *Fausto* case, the government's argument loses any of its facial appeal." *Id.*

> *Fausto* does not hold that the CSRA makes impermissible "judicial review of *any* action affecting federal employees." *Bosco v. United States*, 931 F.2d 879, 883 (Fed. Cir. 1991). Rather, *Fausto* holds that the CSRA provides "the only means of review as to the types of adverse personnel action specifically *covered* by the CSRA." *Id.* The present case involves a type of personnel action – withholding of pay for income tax purposes – that "is not *covered* at all by the CSRA, for any employees." *Id.* There is no reason to suppose that the CSRA was intended to preclude this sort of action under the Back Pay Act and therefore *Fausto* is inapplicable.

Id.

In *Worthington v. United States*, 168 F.3d 24 (Fed. Cir. 1999), the Federal Circuit upheld on the same ground the authority of the federal courts to determine if a federal employee was entitled to back pay because he had been required to work a compressed schedule.

> This court has noted that *Fausto* deprives the Court of Federal Claims of jurisdiction over personnel actions covered by the CSRA.... The CSRA, by its terms, however, does not encompass every adverse personnel action against a federal employee.... To

> determine the coverage of the CSRA, this court assesses the jurisdiction of the [Merit Systems Protection] Board.... [T]his court finds no law, rule, or regulation that gives the Board jurisdiction over Worthington's claim.... [B]ecause Worthington's claim is not within the coverage of the CSRA ... the Court of Federal Claims has jurisdiction to adjudicate this dispute.

168 F.3d at 26-27.[8]

The narrower preclusion rule in the Federal Circuit is of particular practical importance because it governs actions in the Court of Federal Claims, which has original jurisdiction under the Tucker Act over claims by federal employees throughout the nation.[9] Applying the Federal Circuit precedents in *Bosco*, *Romero*, and *Worthington*, the Court of Federal Claims has entertained and resolved a wide variety of federal employment actions that were not authorized

---

[8] Since *Worthington* the Federal Circuit rule has been sufficiently well established that that court of appeals has upheld federal jurisdiction over employment claims outside the scope of the CSRA without reiterating that circuit's longstanding rejection of the government's interpretation of *Fausto*. *Crowley v. United States*, 398 F.3d 1329 (Fed. Cir. 2005) (action for higher wages by federal employee claiming entitlement to supplemental pay under the Federal Law Enforcement Pay Reform Act); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002) (action for backpay by federal employee asserting entitlement to pay differential for work in Alaska).

[9] That court has exclusive jurisdiction over Tucker Act claims exceeding $10,000. 28 U.S.C. § 1346(a)(2).

by the CSRA itself. The Court of Federal Claims, for example, has upheld actions by individuals claiming they were unlawfully denied appointment to federal positions where the asserted violation of the claim was not covered by the CSRA.[10] The Court of Federal Claims has repeatedly adjudicated claims that federal workers were being paid at a lower rate than the rate to which they were entitled. Those lawsuits included claims for severance pay,[11] overtime pay,[12] availability pay,[13]

---

[10] *Ainslie v. United States*, 55 Fed.Cl. 103, 108 n.2 (2003) (federal law mandating hiring of certain former military reservists; claim not barred because it was not "covered by the ... CSRA"); *Scholl v. United States*, 61 Fed.Cl. 322, 325 (2004) (mandatory reappointment of bankruptcy judges; claim not precluded by CSRA because it was not a "claim of the sort the [MSRB] has subject matter jurisdiction over"; relying on *Worthington*).

[11] *Sloan v. United States*, 36 Fed.Cl. 163, 165 (1996) (severance pay claim not barred by *Fausto* so long as court does not undertake to correct an adverse action); *Bell v. United States*, 23 Ct.Cl. 73, 77 (1991) (claim for severance pay does not require determination that dismissal was an "unjustified or unwarranted personnel action"; such claims are "analogous to ones for unpaid salary for time actually worked"); *Hedman v. United States*, 15 Ct.Cl. 304, 317-22 (1988) (distinguishing *Fausto*).

[12] *Adams v. United States*, 48 Fed.Cl. 602, 606 n.2 (2001) (action permissible because "[t]he denial of FLSA overtime pay falls outside the CSRA's coverage"; citing *Worthington*); *Abramson v. United States*, 42 Fed.Cl. 326, 332 (1998) ("[p]laintiffs claim overtime pay for overtime work.... The CSRA does not explicitly cover this claim"; citing *Romero*, *Worthington* and *Bosco*).

[13] *Vanderpool v. United States*, 84 Fed.Cl. 66, 78-79 (2008) ("[b]ecause none of the plaintiffs in this case initially received availability pay, there could be no reduction in pay, and ... the

(Continued on following page)

premium pay,[14] remote duty allowances,[15] living quarter allowances,[16] travel expenses,[17] and pay retention benefits,[18] as well as claims that federal agencies failed to increase salaries as required by law.[19] None of these actions were authorized by the

---

MSPB does not possess jurisdiction"; citing *Worthington*); *Bradley v. United States*, 42 Fed.Cl. 333, 336 (1998) (although the MSPB would have jurisdiction over a reduction in pay, "[p]laintiffs did not suffer a reduction in pay.... [P]laintiffs' claims are appropriately classified as ones for withholding pay as a result of a miscalculation on the part of the government"; distinguishing *Fausto*).

[14] *Contreras v. United States*, 64 Fed.Cl. 587 (2005) (disputes about premium pay are outside the jurisdiction of the MSPB because "[t]o be deprived of [premium pay] is not to have one's pay reduced; it is to lose a bonus"; citing *Worthington*); *Hannon v. United States*, 48 Fed.Cl. 15, 25 (2000) ("[t]he plaintiffs do not allege entitlement as a result of a mistaken adverse personnel action, but seek ... premium pay ... for work they completed. As the CSRA does not cover such claims, the MSPB does not have jurisdiction over those claims"; citing *Worthington* and *Bosco*).

[15] *Agee v. United States*, 77 Fed.Cl. 84, 88 (2007) (although MSPB has exclusive jurisdiction over disputes regarding retirement benefits, pay claims can be adjudicated by courts even though they may affect those benefits).

[16] *Zervas v. United States*, 26 Ct.Cl. 1425 (1992) (relying on *Bosco*).

[17] *Bailey v. United States*, 52 Fed.Cl. 105 (2002) (relying on *Worthington*, *Romero*, and *Bosco*).

[18] *Zervas v. United States*, *supra*.

[19] *Berry v. United States*, 86 Fed.Cl. 24, 30 (2009) (claim for pay increase barred only if within the jurisdiction of the MSPB; citing *Worthington*); *King v. United States*, 81 Fed.Cl. 766, 771 (2008) ("[l]ike *Worthington*, and unlike *Fausto*, this case does not involve a personnel action governed by the CSRA because

(Continued on following page)

CSRA, and under the District of Columbia Circuit preclusion rule all of them were barred by the CSRA.

In those cases in which the Federal Circuit has concluded that a claim is precluded by the CSRA, its decision has been based on a finding that the specific claim at issue was indeed covered by the CSRA. *Read v. United States*, 254 F.3d 1064, 1067 (Fed. Cir. 2001) (a specific provision of the CSRA "covers the 'removal' of an employee," the action disputed by the plaintiff); *Gallo v. United States*, 529 F.3d 1345, 1352 (Fed. Cir. 2008) (claim under Federal Employees' Compensation Act covered by the CSRA because the issue was "within the [MSPB]'s appellate jurisdiction under the CSRA").

Like the Federal Circuit, the Ninth Circuit applies a preclusion rule more limited than that in the District of Columbia Circuit. Except in cases involving adverse personnel actions similar to *Fausto*, in the Ninth Circuit the CSRA precludes an employment related claim of a federal worker only if the action complained of constituted a "prohibited personnel practice" forbidden by Chapter 23 of the CSRA.[20] Thus in the Ninth Circuit such a federal

---

plaintiffs' claim for back pay is not based on personnel actions for unacceptable job performance, prohibited personnel practices, or adverse personnel actions").

[20] *Mangano v. United States*, 529 F.3d 1243, 1246 (9th Cir. 2008) ("[t]he CSRA preempts Dr. Mangano's [Federal Tort Claims Act] claims in this case if the conduct underlying his complaint can be challenged as 'prohibited personnel practices'

(Continued on following page)

employment claim is permitted if the action complained of was neither an adverse personnel action within the scope of the CSRA, nor a prohibited personnel practice forbidden by Chapter 23.

> [Plaintiff's allegations] fit no category of personnel actions listed in § 2302(a)(2). Her FTCA claims are therefore not preempted by the CSRA. The Government attempts to avoid this result by citing many of our previous holdings pertaining to the broad purpose and preemptive effect of the CSRA.... [The cases cited by the government] are distinguishable because the conduct in those cases, unlike the conduct alleged [by the plaintiff here], was within the scope of personnel actions prohibited by the CSRA. The CSRA is the exclusive remedy for all prohibited personnel actions.

Brock v. United States, 64 F.3d 1421, 1424-25 (9th Cir. 1995). That Ninth Circuit standard is reflected in the briefs filed by the government in that circuit. "The 'controlling factor' in determining whether the CSRA preempts a claim is whether the action can be challenged as a 'prohibited personnel practice' under

---

within the meaning of the CSRA"); *Mahtesian v. Lee*, 406 F.3d 1131, 1134 (9th Cir. 2005); *Orsay v. United States Department of Justice*, 289 F.3d 1125, 1128 (9th Cir. 2002) ("[i]f the conduct that Appellants challenge in this action falls within the scope of the CSRA's 'prohibited personnel practices,' then the CSRA's administrative procedures are Appellant's only remedy, and the federal courts cannot resolve Appellant's claims under the Privacy Act and the FTCA").

the CSRA. *Saul [v. United States*, 928 F.2d 829,] 841 [(9th Cir. 1991)]."[21]

The Tenth Circuit applies the same preclusion standard as the Ninth. "Federal and state court actions 'complain[ing] of activities prohibited by the CSRA ... are preempted by the CSRA.'" *Steele v. United States*, 19 F.3d 531, 533 (10th Cir. 1994) (quoting *Petrini v. Howard*, 918 F.2d 1482, 1485 (10th Cir. 1990)). The Second Circuit also appears to apply this standard. "[F]or claims falling within its purview, the CSRA provides the exclusive remedy. *Tiltti v. Weise*, [55 F.3d 596, 600 (2d Cir. 1998)]." *Sawyer v. Musumeci*, 1998 WL 743734 at *1 (2d Cir. 1998).[22]

(4) Court of Appeals below expressed "doubts about [the Federal Circuit decision in] *Worthington*, which appears to be in significant tension with this court's precedents in *Filebark* ... and *Carducci*." (Pet. App. 6a). But there is far more than "significant tension" between the District of Columbia Circuit

---

[21] Brief of Defendant-Appellee, *Mangano v. United States*, No. 05-17334 (9th Cir.), 2006 WL 2427080 at *9.

[22] Although *Sawyer* is not officially reported, the government reads the reported decision in *Tiltti* in a similar manner. Brief for Defendants-Appellees, *Johnson v. United States*, 81 Fed.Appx. 388 (2d Cir. 2003), 2003 WL 24057791 at *15 ("The CSRA provides the exclusive remedy by which federal employees may challenge adverse personnel actions, more particularly denominated as 'prohibited personnel practices'; unless the CSRA either explicitly or by necessary implication sanctions judicial challenges *to such actions*, judicial challenge is foreclosed. *Tiltti v. Weise*.") (emphasis added).

precedents in *Carducci*, *Filebark*, and the instant case on the one hand, and the Federal Circuit precedents in *Bosco*, *Romero* and *Worthington* on the other. Those deeply embedded sets of precedents are entirely inconsistent with one another; the Federal Circuit precedents have repeatedly rejected the sweeping preclusion rule that the government has advanced and that the District of Columbia Circuit has repeatedly embraced.

Referring to another leading Federal Circuit case, the District of Columbia Circuit in *Filebark* commented that "it may ... be true that *Mudge* [*v. United States,* 308 F.3d 1220 (Fed. Cir. 2002)] correctly allowed the employees in that case to proceed." 555 F.3d at 1012. But if, as the court below held, the CSRA provides the exclusive basis on which the federal courts can hear employment-related claims of federal workers, it is impossible to understand how the Federal Circuit in *Mudge* could properly have permitted that action to continue. In *Mudge* the Federal Circuit upheld the jurisdiction of the federal courts to entertain an action for backpay brought by a federal employee who claimed he was entitled to premium pay for work in Alaska. The government argued in *Mudge* – just as it did in the instant case – that the federal courts could only entertain employment-related claims of federal employees in those specific circumstances enumerated

in the CSRA.[23] If the court of appeals below was correct in upholding that sweeping contention, the Federal Circuit decision in *Mudge* was necessarily incorrect.

II. THIS INTER-CIRCUIT CONFLICT INVOLVES AN IMPORTANT AND RECURRING ISSUE

Although this conflict involves a total of seven circuits, it is particularly important to resolve the conflict on this issue between the District of Columbia Circuit and the Federal Circuit. Approximately 280,000 federal employees work in the District of Columbia, a substantial portion of the federal civilian workforce. When a federal employment dispute arises in the District of Columbia, whether the governing preclusion standard is that of the District of Columbia Circuit or the Federal Circuit is controlled by whether the claim falls within the Federal Circuit's Tucker Act jurisdiction. If the claim of a federal worker can properly be cast as a claim within the scope of the Tucker Act, his or her lawsuit may well proceed in the Court of Federal Claims under the narrower Federal Circuit preclusion rule. If, however, as here, that claim does not fall within the Tucker Act, and thus must be brought in the District Court for the District of Columbia, that action will almost certainly be dismissed under the sweeping District of

---

[23] Brief of Defendant-Appellee, 2002 WL 34235708 at *7-*8.

Columbia Circuit preclusion rule. A federal employee working in the District of Columbia who contends he or she was unlawfully denied a position could not obtain an injunction, because that remedy would have to be sought in the District Court and would be governed by District of Columbia Circuit precedent; that same employee, however, could often achieve the same result by suing (repeatedly) for backpay in the Court of Federal Claims, where Federal Circuit precedent applies. It is incongruous that federal appellate courts located only three Metro stops apart on the Red Line are applying to the claims of federal employees in the nation's capitol avowedly inconsistent and outcome determinative preclusion standards.[24]

The differing treatment of federal employees seeking the same type of remedy is equally incongruous. Many claims asserting that a federal employee is receiving insufficient compensation, for example, are within the Tucker Act jurisdiction of the Court of Federal Claims (and thus governed by the Federal Circuit preclusion rule), but not all. The Court of Federal Claims has upheld such compensation claims under the Bankruptcy Reform Act,[25] the

---

[24] Similarly, for federal employees in the Sixth and Eleventh Circuits, which CSRA preclusion rule applies turns not on the regional court of appeals within which the claim arises, but on the happenstance of whether the claim happens to fall within the subject matter jurisdiction of the Federal Circuit and is thus outside the authority of those regional appellate courts.

[25] *Scholl v. United States*, 61 Fed.Cl. 322 (2004).

Law Enforcement Availability Pay Act,[26] the Federal Law Enforcement Pay Reform Act,[27] the Severance Pay Act,[28] the Fair Labor Standards Act,[29] the Kiess Act,[30] and a variety of other federal statutes.[31] In *Filebark*, however, the Federal Circuit concluded that only prospective compensatory relief was available, thus barring reliance on the Tucker Act. *Todd v. United States*, 386 F.3d 1091 (Fed. Cir. 2004). The *Filebark* plaintiffs' claim for increased compensation was thus adjudicated in the District of Columbia Circuit where, unlike compensation claims addressed in the Federal Circuit, it was rejected as precluded by the CSRA. That difference in outcome occurred solely because of the conflicting preclusion rules applied by the various circuits; no lower court to our knowledge has suggested that the CSRA itself should be read to distinguish in this way among federal employees asserting entitlement to a higher rate of pay.

---

[26] *Vanderpool v. United States*, 84 Fed.Cl. 66 (2008); *Bradley v. United States*, 42 Fed.Cl. 333 (1998).

[27] *Contreras v. United States*, 64 Fed.Cl. 583 (2005); *Hannon v. United States*, 48 Fed.Cl. 15 (2000).

[28] *Sloan v. United States*, 36 Fed.Cl. 163 (1996); *Hedman v. United States*, 15 Ct.Cl. 304 (1988).

[29] *Agee v. United States*, 77 Fed.Cl. 84 (2007); *Adams v. United States*, 48 Fed.Cl. 602 (2001).

[30] *Abramson v. United States*, 42 Fed.Cl. 326 (1998).

[31] *Ainslie v. United States*, 55 Fed.Cl. 103 (5 U.S.C. § 3329(b)); *King v. United States*, 81 Fed.Cl. 766 (2008) (28 U.S.C. § 540C).

Resolution of this conflict is of particular importance because of the unique appellate role of the Federal Circuit. In cases filed in a district court anywhere in the United States, if that district court's jurisdiction was "based, in whole or in part, on section 1346" of Title 28, the Little Tucker Act, any appeal is to the Court of Appeals for the Federal Circuit, rather than to the regional court of appeals for the circuit in which the district court is located. 29 U.S.C. § 1295(a)(2); see *United States v. Hohri*, 482 U.S. 64 (1987). The Federal Circuit decision in *Romero*, for example, overturned the decision of a district court in the First Circuit that had held the claim in that case was barred by the CSRA;[32] a number of other Federal Circuit decisions applying that Circuit's view of the limited preclusive effect of the CSRA involved appeals from the regional district courts.[33] In any case under the Administrative Procedure Act, or any other federal statute, in which the plaintiff could include a colorable section 1346 claim, the appeal would lie to the Federal Circuit, which limits CSRA preclusion to adverse personnel action cases. That would include, as in *Hohri* itself, an action filed in the District Court for the District of Columbia.

---

[32] *Romero v. Brady*, 764 F.Supp. 227, 237-38 (D.P.R. 1991).

[33] E.g., *Muniz v. United States*, 972 F.2d 1304 (Fed. Cir. 1992) (appeal from the District Court for the Northern District of California); *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990) (en banc) (appeal from the District Court for the Central District of California).

The United States has repeatedly recognized the considerable practical importance of whether the CSRA precludes actions by individuals for whom the CSRA itself provides no judicial remedy. In *United States v. Fausto*, in seeking review by this Court of the Federal Circuit decision permitting certain federal employees to obtain review of adverse personnel actions, the government correctly emphasized that the issue was one of "considerable practical importance to the federal government."[34] In *Cooper v. Kotarski*, 487 U.S. 1212 (1988), the government asked this Court to decide whether a federal employee can bring a constitutional challenge to removal from a probationary position. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The United States explained that the question was "of great and recurring practical importance to the federal government," and highlighted the "significant disparity in the treatment of federal employees, depending solely upon where they reside."[35] In its response in *Whitman*, agreeing in part that certiorari should be granted, the United States noted the "considerable practical importance [of the issue] to the Nation's largest employer and its employees," and pointed that there was an "untenable lack of

---

[34] Petition for Writ of Certiorari, *United States v. Fausto*, No. 86-595, at 16.

[35] Petition for Writ of Certiorari, *Cooper v. Kotarski*, No. 86-1813, at 10, 15.

uniformity in federal employment law."[36] On six occasions in which a circuit court has held that a federal employee could bring an action under a statute other than the CSRA, the United States has sought rehearing en banc in that court of appeals, arguing that the issue was one of sufficient importance to warrant that exceptional treatment.[37] See Fed. Rule App. Pro. 35(b)(1)(B).

In *Weber v. Department of Veterans Affairs*, 129 S.Ct. 754 (2009), the petitioner asserted that the court of appeals decision in that case was inconsistent with the Federal Circuit decisions in *Romero* and *Bosco*.[38] The government argued in its response that *Weber* was not an appropriate vehicle for raising that issue because the petitioner's claims in that case indisputably *were* covered by the CSRA. Weber was challenging his dismissal, an adverse personnel action under the CSRA; like the plaintiff in *Fausto*, Weber could not invoke the remedies in Chapter 75

---

[36] *Whitman v. Department of Transportation*, Brief of Respondent, at 20 (June 6, 2005).

[37] See *Crowley v. United States*, 398 F.3d 1329 (Fed. Cir. 2005) (petition for rehearing denied); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002) (petition for rehearing en banc denied); *Burroughs v. OPM*, 784 F.2d 933 (9th Cir. 1986) (denying rehearing en banc); *Fausto v. United States*, 791 F.2d 1554 (Fed. Cir. 1986) (denying rehearing en banc); *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990) (en banc); *Bosco v. United States*, 976 F.2d 710 (Fed. Cir. 1992) (denying rehearing en banc).

[38] Petition for Writ of Certiorari, *Weber v. Department of Veterans Affairs*, No. 08-281 at 11.

because he was outside the definition of "employees" protected by that provision. The government correctly explained why the dismissal of Weber's claim was thus not inconsistent with *Romero* and *Bosco*.

> In *Romero*, the Federal Circuit interpreted this Court's holding in *Fausto* as being inapplicable to "the type of personnel action – withholding of pay for income tax purposes – that 'is not covered at all by the CSRA, for any employees.'" *Romero*, 38 F.3d at 1211 ... ; accord *Bosco*, 931 F.2d at 833 (viewing *Fausto* as holding that the CSRA is "the only means of review as to the *types* of adverse personnel action specifically *covered* by the CSRA" (first emphasis added)). But the "type of personnel action" at issue in this case – separation from the service – is *expressly* addressed by the CSRA.

Brief for the Respondents in Opposition, *Weber v. Department of Veterans Affairs*, No. 08-281 at 11 (Nov. 3, 2008).

Here, unlike *Weber*, the court of appeals held that petitioners' claims were barred regardless of whether they were not "addressed by the CSRA," expressly refusing to rely on the district court's suggestion that a violation of section 1474 might also be forbidden by Chapter 23 of the CSRA. The government prevailed in the court of appeals based solely on its far more sweeping contention that the CSRA precluded this action even if the plaintiff's claim was not in any sense covered by the CSRA. This case presents an

appropriate vehicle for resolving that contention and the question presented.

In the court of appeals in the instant case, the government pointed out that

> the Federal Circuit's *Worthington* decision is not binding on this Court. "The federal courts spread across the country owe respect to each other's efforts ... , but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court...."[39]

Certiorari should be granted to establish the binding precedent that this Court alone can provide.

---

[39] Brief for Appellee, *Grosdidier v. Chairman, Broadcasting Board of Governors*, No. 08-5181 (D.C.Cir.), at 22 n.5 (quoting *In Re Korean Airlines Disaster of September 1, 1983*, 829 F.2d 1171, 1176 (D.C.Cir. 1987)).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

LESLIE D. ALDERMAN, III
ALDERMAN, DEVORSETZ & HORA PLLC
1025 Connecticut Ave., N.W.
Suite 615
Washington, D.C. 20036
(202) 969-8220

Counsel for Petitioners

**Counsel of Record*

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 19, 2009 Decided April 3, 2009

No. 08-5181

CAMILLE GROSDIDIER, PERSONALLY AND AS CLASS REPRESENTATIVE, ET AL.,
APPELLANTS

V.

CHAIRMAN, BROADCASTING BOARD OF GOVERNORS,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:07-cv-01551-ESH)

Leslie D. Alderman III argued the cause and filed the briefs for appellants.

Jane M. Lyons, Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were *Jeffrey A. Taylor*, U.S. Attorney, and *R. Craig Lawrence*, Assistant U.S. Attorney.

Before: SENTELLE, *Chief Judge*, and GINSBURG and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH.

KAVANAUGH, *Circuit Judge*: When the Broadcasting Board of Governors denied promotions to three employees, they sued the Board under the Administrative Procedure Act. But except where Congress specifies otherwise, the Civil Service Reform Act is the proper statutory vehicle for covered federal employees to challenge personnel actions by their employers. The District Court therefore dismissed this case. We affirm.

I

The Broadcasting Board of Governors is a federal agency responsible for the U.S. Government's international broadcasting. It manages a network of individual broadcasting services, including the Voice of America, which is known as the VOA. The VOA transmits news, educational, and cultural programming around the world in more than 40 different languages to an estimated global audience of more than 100 million people.

Plaintiffs Camille Grosdidier, Jorge Bustamante, and Carlos Martinez have worked for the VOA as international broadcasters. They are American citizens. In recent years, they have all applied for open positions within the VOA. In each case, however, the VOA instead chose to hire non-citizens for the posts. In doing so, the VOA relied upon 22 U.S.C. § 1474(1), which authorizes the Federal Government to "employ, without regard to the civil service and classification laws, aliens within the United States and abroad for

service in the United States relating to the . . . preparation and production of foreign language programs when suitably qualified United States citizens are not available when job vacancies occur."[1]

Plaintiffs sued the Board under the Administrative Procedure Act. They argued that they were "suitably qualified" under § 1474 and that the Board thus acted arbitrarily and capriciously in hiring non-citizens in their places. They brought their lawsuit on behalf of themselves and a purported class of similarly situated citizens who were passed over in favor of non-citizen applicants.

The District Court dismissed plaintiffs' case. It held that the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.), not the APA, was the

---

[1] In full, 22 U.S.C. § 1474(1) provides as follows: "In carrying out the provisions of this chapter [relating to U.S. information and educational exchange programs], the Secretary, or any Government agency authorized to administer such provisions, may – (1) employ, without regard to the civil service and classification laws, aliens within the United States and abroad for service in the United States relating to the translation or narration of colloquial speech in foreign languages or the preparation and production of foreign language programs when suitably qualified United States citizens are not available when job vacancies occur, and aliens so employed abroad may be admitted to the United States, if otherwise qualified, as nonimmigrants under section 1101(a)(15) of title 8 for such time and under such conditions and procedures as may be established by the Director of the United States Information Agency and the Attorney General."

statute under which plaintiffs must challenge these personnel actions. On appeal, our review of this legal question is de novo.

II

Plaintiffs argue that the Civil Service Reform Act is not the exclusive avenue for covered federal employees to bring suits challenging personnel actions and that they may pursue their claim under the Administrative Procedure Act. We disagree.

A

In 1978, Congress passed and President Carter signed the CSRA. The Act brought about "the most systematic governmental review and revision of the federal civil service system since the enactment of the Pendleton Act in 1883." William V. Luneburg, *The Federal Personnel Complaint, Appeal, and Grievance Systems: A Structural Overview and Proposed Revisions*, 78 KY. L.J. 1, 4 (1989). The CSRA replaced "the haphazard arrangements for administrative and judicial review of personnel action." *United States v. Fausto*, 484 U.S. 439, 444 (1988). To reform the "outdated patchwork of statutes and rules built up over almost a century," Congress created "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 444, 445 (internal quotation marks omitted).

The CSRA protects covered federal employees against a broad range of personnel practices, and it supplies a variety of causes of action and remedies to employees when their rights under the statute are violated. As our Court has emphasized, the CSRA is comprehensive and exclusive. Federal employees may not circumvent the Act's requirements and limitations by resorting to the catchall APA to challenge agency employment actions. *Filebark v. Dep't of Transp.*, 555 F.3d 1009, 1010 (D.C. Cir. 2009); *Fornaro v. James*, 416 F.3d 63, 66-67 (D.C. Cir. 2005); *Graham v. Ashcroft*, 358 F.3d 931, 933-36 (D.C. Cir. 2004); *Carducci v. Regan*, 714 F.2d 171, 172 (D.C. Cir. 1983). We have emphasized, moreover, that the CSRA is the exclusive avenue for suit even if the plaintiff cannot prevail in a claim under the CSRA. As we have explained, Congress designed the CSRA's remedial scheme with care, "intentionally providing – and intentionally not providing – particular forums and procedures for particular kinds of claims." *Filebark*, 555 F.3d at 1010. Allowing employees to end-run the CSRA would undermine Congress's efforts to foster a "unitary and consistent Executive Branch position on matters involving personnel action." *Fausto*, 484 U.S. at 449; *see also Graham*, 358 F.3d at 934. Therefore, we have told federal employees, "what you get under the CSRA is what you get." *Fornaro*, 416 F.3d at 67.[2]

---

[2] Of course, Congress is always free to make explicit exceptions to the exclusivity of the CSRA. For example, the CSRA's express terms make clear that the Act does not

(Continued on following page)

B

In the face of our extensive body of CSRA precedents casting doubt on their submission, plaintiffs cite the Federal Circuit's decision in *Worthington v. United States,* 168 F.3d 24 (Fed. Cir. 1999). There, the Federal Circuit allowed an employee to bring claims pursuant to the Tucker Act concerning a personnel action (in that case, the government's alleged failure to provide an employee with back pay after inappropriately placing him on a compressed work schedule). *Id.* at 26, 27. *Worthington* does not apply here because this case involves the APA, not the Tucker Act. And in any event, we have some doubts about *Worthington,* which appears to be in significant tension with this Court's precedents in *Filebark, Fornaro, Graham*, and *Carducci.*

Plaintiffs also point to the text of 22 U.S.C. § 1474(1) – in particular the provision allowing the VOA to employ non-citizens "without regard to the civil service and classification laws." Appellants' Br. 23-24. But § 1474 has nothing to do with the question before us. Section 1474 contemplates the hiring of non-citizens notwithstanding the usual prohibitions on such hiring, and without regard to any limitations the civil service laws might place on that hiring. The

---

extinguish any right or remedy available to federal employees under federal anti-discrimination laws. 5 U.S.C. § 2302(d); *see also* 42 U.S.C. § 2000e-16(c).

statute does nothing to affect the exclusivity of the CSRA for suits targeting personnel decisions.

* * *

In affirming the District Court's dismissal of this case, we need not decide whether the violation of § 1474 alleged by plaintiffs is, in fact, prohibited under the CSRA. Regardless of the answer to the question, plaintiffs cannot bring this suit under the APA. We affirm the District Court's judgment dismissing this case.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMILLE GROSDIDIER, et al.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 07-1551 (ESH)**
JAMES K. GLASSMAN, Chairman, Broadcasting Board of Governors,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

(Filed Apr. 22, 2008)

Plaintiffs have brought suit alleging that the Broadcasting Board Governors ("BBG") unlawfully hired foreigners to fill positions for which plaintiffs, who are United States citizens, had applied and were suitably qualified, in violation of 22 U.S.C. § 1471(1) and agency regulations. In addition to themselves, plaintiffs seek to represent a class of similarly-situated U.S. citizens who applied for a promotion within the BBG, were deemed qualified, but were denied the position in favor of a non-citizen. Defendant has moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. For the reasons set forth herein, the Court will grant the motion.

BACKGROUND

I. Factual History

Plaintiffs Camille Grosdidier, Jorge Bustamante, and Carlos Martinez are U.S. citizens employed in the French to Africa Division of the Voice of America ("VOA"), the VOA Television Division, and the Office of Cuba Broadcasting, respectively. (First Am. Compl. ¶¶ 3-5.) Defendant BBG is an independent federal agency that administers and funds the Voice of America and the Office of Cuba Broadcasting, as well as other international broadcasters.[1] (*Id.* ¶ 7.)

On May 22, 2002, Grosdidier applied for a non-supervisory GS-13 International Broadcaster position in her division at the VOA. (*Id.* ¶ 17.) Although she was deemed qualified and was interviewed for the position, a Haitian citizen was ultimately selected. (*Id.*) On February 13, 2006, Grosdidier applied for a Supervisory GS-13 International Broadcaster position in her division. (*Id.* ¶ 18.) Again, she was deemed qualified and was interviewed for the position, but a citizen of Chad was selected. (*Id.*) Similarly, in April 2006, Bustamante and Martinez both applied for the same position as a Supervisory International Broadcaster in the VOA Latin American Division. (*Id.* ¶¶ 21, 24.) Although they were both deemed qualified

---

[1] In addition to the VOA and the Office of Cuba Broadcasting, these broadcasters include Radio Free Asia, Radio Sawa, Alhurra, and Radio Free Europe/Radio Liberty. (*Id.*)

and were interviewed for the position, a non-citizen was selected. (*Id.*)

II. Procedural History

On September 7, 2006, Grosdidier filed suit against the United States in the Court of Federal Claims, alleging that the BBG, by denying her promotions in favor of non-U.S. citizens, had violated 22 U.S.C. § 1474(1), which provides for the hiring of non-citizens when "suitably qualified" U.S. citizens are unavailable. *See Grosdidier v. United States*, 77 Fed. Cl. 106 (Fed. Cl. 2007). Grosdidier brought suit pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), for the recovery of money damages under the Back Pay Act, 5 U.S.C. § 5596. As in the instant suit, Grosdidier sought to represent a class of similarly-situated U.S. citizens who, although they had been deemed qualified, were denied promotions by the BBG in favor of non-citizens. 77 Fed. Cl. at 107 n.2. The court dismissed Grosdidier's action for lack of subject matter jurisdiction, concluding that § 1474(1) did not mandate the payment of money damages.[2] *Id.* at 110.

---

[2] In light of this disposition, the court did not reach the issues of whether class certification was warranted and whether, as defendant argued there and reiterates here, the court lacked jurisdiction based on the Civil Service Reform Act of 1978.

Seeking to salvage their challenge to defendant's promotion decisions, plaintiffs filed the instant action on August 31, 2007, alleging that defendant, by selecting non-U.S. citizens for the VOA positions for which plaintiffs had applied, violated § 1474(1) and defendant's regulations, which permit the hiring of non-citizens only when "equally or better qualified" U.S. citizens are unavailable.[3] Recasting the prior

---

[3] 22 U.S.C. § 1474(1) provides in pertinent part:

> [T]he Secretary, or any Government agency authorized to administer such provisions may (1) employ, without regard to the civil service and classification laws, aliens within the United States and abroad for service in the United States relating to the translator or narration of colloquial speech in foreign languages or the preparation and production of foreign language programs *when suitably qualified United States citizens are not available when job vacancies occur* . . . .

(emphasis added). BBG rules implementing § 1474(1) provide that

> [a] non-U.S. citizen may be appointed only after *reasonable efforts to recruit equally or better qualified U.S. citizens have been made and have been unsuccessful. A* non-U.S. citizen may be employed or promoted *only if no equally or better qualified U.S. citizen is available to perform the duties of the position*. . . . As a matter of Broadcasting policy, non-U.S. citizens will not be employed in or promoted to supervisory positions. . . . (1) Exceptions will be allowed only on an individual basis when the appropriate Office, or Service Head determines, with the concurrence of the Director of Personnel that the *unavailability of an equally or better qualified U.S. citizen* to perform such supervisory . . . functions is not only significantly handicapping the ability of the Office, or

(Continued on following page)

Grosdidier complaint as one for equitable relief and back pay under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, plaintiffs seek a declaration on behalf of themselves and a class of similarly-situated BBG employees that each selection by defendant of a non-U.S. citizen over a suitably qualified U.S. citizen was unlawful and ask that the Court set aside these decisions; grant the promotions to the plaintiffs and class members; and order the payment of benefits, including back pay, and fees and costs.

Defendant has moved to dismiss the complaint, arguing that this Court lacks subject matter jurisdiction because the Civil Service Reform Act of 1978 ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* (codified as amended in scattered sections of 5 U.S.C.), is the exclusive remedy for plaintiffs' claims.

ANALYSIS

I. Standard of Review

On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), plaintiff bears the burden of establishing by a preponderance of the evidence that the court has subject matter jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A court must accept as true all factual

---

Service to operate, but also is having an adverse impact on Broadcasting's mission.

BBG Manual of Operations & Administration, Part V-A, §§ 822.1(a), (c) (AR at 13 (emphasis added)).

allegations in the complaint. *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). A court may dismiss a complaint for lack of subject matter jurisdiction only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" *Richardson v. United States,* 193 F.3d 545, 549 (D.C. Cir. 1999) (quoting *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC,* 148 F.3d 1080, 1086 (D.C. Cir. 1998)). In considering the sufficiency of a plaintiff's allegations for this purpose, a court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Scis.,* 974 F.2d 192, 197 (D.C. Cir. 1992).

II. Discussion

The CSRA comprehensively overhauled the federal civil service system, establishing an elaborate new framework for evaluating personnel actions taken against federal employees. The Supreme Court has described this framework as "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States v. Fausto*, 484 U.S. 439, 445 (1988). The CSRA provides procedural protections for three types of personnel actions: (1) "adverse actions," such as removal, suspension, or reduction in grade or pay, taken in response to employee misconduct in order to promote the "efficiency of the service," 5 U.S.C. §§ 7503, 7513; (2) personnel actions, such as removal or reduction in

grade, taken in response to unacceptable job performance, 5 U.S.C. § 4303; and (3) certain "prohibited personnel practices" involving personnel actions such as appointment, promotion, disciplinary action, and decisions concerning pay, benefits or awards, 5 U.S.C. § 2302.

For specified "adverse actions," the statute provides for direct judicial review after extensive prior administrative proceedings; for specified "prohibited personnel practices," so defined because they are "infected by particularly heinous motivations or disregard of law," the statute provides for review by the Office of Special Counsel ("OSC") "with judicial scrutiny limited, at most, to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry;" and for other minor personnel actions, the statute provides for review by neither the OSC nor the courts. *Carducci v. Regan,* 714 F.2d 171, 175 (D.C. Cir. 1983) (internal quotations omitted). These protections constitute an "exhaustive remedial scheme" for reviewing personnel actions taken against federal employees. *Id.* at 174. Accordingly, the CSRA precludes APA-based personnel claims that come within its purview. "[An] employee . . . cannot circumvent the statute's comprehensive and carefully balanced remedial scheme by using the APA to proceed directly to court." *Graham v. Dep't of Justice,* No. 02-1231, 2002 U.S. Dist. LEXIS 27419, at *6 (D.D.C. Nov. 20, 2002) (citing, *inter alia, Harrison v. Bowen,* 815 F.2d 1505, 1514-16 (D.C. Cir. 1987)), *aff'd sub nom. Graham v. Ashcroft,* No. 03-5025, 2003 U.S.

App. LEXIS 16108 (D.C. Cir. Aug. 5, 2003); *see also Nat'l Treasury Employees Union v. Egger,* 783 F.2d 1114 (D.C. Cir. 1986) (employees claiming that job reclassification resulted from a "prohibited personnel practice" had to rely on OSC); *Gray v. Office of Pers. Mgmt.,* 771 F.2d 1504 (D.C. Cir. 1985) (ALJs alleging "prohibited personnel practice" could not seek direct judicial review of a failure to promote, but had to present claims to OSC).

The Court must therefore determine whether plaintiffs' claims fall within the CSRA's exclusive remedial scheme. Decisions regarding federal employee promotions fall squarely within the CSRA's definition of "personnel action." *See* 5 U.S.C. § 2302(a)(2)(A)(ii). However, the CSRA protects employees from unfair personnel actions regarding promotions only if such actions spring from an improper basis or motive as specified by 5 U.S.C. § 2302(b) (and thus are considered "prohibited personnel practices"). *Carducci,* 714 F.2d at 175 n.3. Such improper bases include taking or failing to take a personnel action "if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301," 5 U.S.C. § 2302(b)(12), which principles in turn include protection against arbitrary action and personal favoritism, § 2301(b)(8)(A), and receipt of "fair and equitable treatment in all aspects of personnel management," § 2301(b)(2).

In this case, plaintiffs allege that defendant acted arbitrarily and capriciously in violation of statute and

its regulations by selecting non-citizens over plaintiffs for jobs for which plaintiffs were at least as, if not more, qualified.[4] This claim clearly implicates the merit principles contained in §§ 2301(b)(8)(A) and (b)(2), and therefore involves an alleged prohibited personnel practice.[5] *Cf. Carducci*, 714 F.2d at 175 (noting that §§ 2301(b)(8)(A) and (b)(2) would give USC jurisdiction over that portion of appellant's complaint that alleged violation of a rule requiring that fact-finding in an agency grievance be carried out by someone who had not been involved in the matter being grieved); *Croddy* v. *FBI*, No. 00-651, 2006 U.S. Dist. LEXIS 71823, at *18 (D.D.C. Sept. 29, 2006) (plaintiffs' claim that defendants' reliance on polygraph test results was arbitrary or that the polygraph process was unfair directly implicated the

---

[4] Plaintiffs do not challenge the facial validity of defendant's regulations implementing 22 U.S.C. § 1474, which require that a U.S. citizen be at least as qualified as his or her foreign competitors in order to be given a promotion preference; rather, they only challenge defendant's application of those rules. Therefore, plaintiffs cannot argue that defendant was obliged to hire them even if they were less qualified than the non-citizen candidates.

[5] Moreover, as defendant contends, plaintiffs' claims also fall within the scope of § 2302(b)(6), which prohibits the "grant [of] any preference or advantage not authorized by law, rule, or regulation to any employee or applicant . . . for the purpose of improving or injuring the prospects of any particular person for employment." Plaintiffs allege that they were equally or better qualified than the non-citizens who were selected by defendant; therefore, by extension, they are contending that defendant granted an improper preference to non-citizens.

merit system principle requiring fair and equitable treatment of employees and applicants).

Accordingly, as plaintiffs' APA claims come within the purview of the CSRA, they are precluded. As the D.C. Circuit has recognized, the "exhaustive remedial scheme of the CSRA would be impermissibly frustrated" by permitting direct judicial review of less significant personnel practices when major adverse actions must first be litigated within the agency. *Carducci*, 714 F.2d at 174.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss [# 13] will be granted, and the above-captioned case is dismissed without prejudice. All other motions are denied as moot.

/s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: April 22, 2008

In the United States Court of Federal Claims

No. 06-622 C
(Filed June 7, 2007)
TO BE PUBLISHED

CAMILLE GROSDIDIER, *Plaintiff*, v. THE UNITED STATES, *Defendant*.	Subject matter jurisdiction; Tucker Act, 28 U.S.C. § 1491(a)(1); Back Pay Act, 5 U.S.C. § 5596; 22 U.S.C. § 1474(1); authority to hire aliens for Voice of America when qualified U.S. citizens not available; money-mandating statute; whether statute is fairly amenable to reading that plaintiff has right to monetary damages in the event of violation

Leslie D. Alderman III, Alderman & Devorsetz, PLLC, Washington, D.C., for plaintiff.

Leslie Cayer Ohta, Trial Attorney, Franklin E. White, Jr., Assistant Director, Jeanne E. Davidson, Director, Peter D. Keisler, Assistant Attorney General, United States Department of Justice, Washington, D.C., for defendant. Elizabeth A. Parish, Broadcasting Board of Governors, Washington, D.C., of counsel.

OPINION AND ORDER

GEORGE W. MILLER, Judge.

This matter is before the Court on defendant's motion to dismiss for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"). Plaintiff Camille Grosdidier filed a complaint on September 7, 2006, alleging that defendant, through the Broadcasting Board of Governors ("BBG"),[1] hired two aliens to fill positions with the Voice of America for which plaintiff, a citizen of the United States, had applied and was suitably qualified, in violation of 22 U.S.C. § 1474(1) (2000), which provides for the hiring of aliens to hold such positions when qualified United States citizens are not available. Defendant filed its motion to dismiss ("Def.'s Mot.," docket entry 6) on December 13, 2006. Plaintiff[2] filed her opposition to

---

[1] The BBG is an independent establishment within the executive branch. 22 U.S.C. § 6203 (2000), 5 U.S.C. § 104 (2000). It has oversight authority over several international broadcasting services of the United States Government, including the Voice of America.

[2] Plaintiff states in her complaint that she has brought this suit as a class action pursuant to RCFC 23 on behalf of all those United States citizens who, within the six years preceding her action, applied for a position with the BBG, were deemed qualified, and were denied the position in favor of a non-citizen of the United States. Compl. ¶¶ 8-9. This matter has not, however, been certified as a class action and, in light of the Court's determination that it lacks subject matter jurisdiction over plaintiff's claim, it is unnecessary for the Court to consider whether class certification would be warranted. *See* RCFC 23(c).

defendant's motion ("Pl.'s Opp'n.," docket entry 8) on January 22, 2007. Defendant filed its reply ("Def.'s Reply," docket entry 10) on March 5, 2007.

For the reasons set forth below, the Court concludes that it lacks jurisdiction over the subject matter of this action. Therefore, the Court grants the Government's motion to dismiss pursuant to RCFC 12(b)(1).

BACKGROUND[3]

Plaintiff, a United States citizen and resident of Washington, D.C., is employed by the BBG[4] in Voice of America's French to Africa Service. Compl. ¶ 6. On May 22, 2002, plaintiff applied for a GS-13 International Radio Broadcaster ("IRB") position under Vacancy Announcement No. IBB1-02-120. *Id.* She was deemed qualified for the position on June 20, 2002, and was later interviewed for it. *Id.* Ultimately, however, plaintiff was not selected for the position, which instead went to Henry Francisque, a citizen of Haiti. *Id.*

---

[3] The facts set forth herein do not constitute findings of fact by the Court. All of the stated facts are drawn from plaintiff's complaint, and are either undisputed or alleged and assumed to be true for purposes of the pending motion.

[4] In her complaint, plaintiff refers to her employer as the "Board of Broadcast Governors." *See* Compl. ¶¶ 3-5, 9. The Court believes, however, that plaintiff intended to refer to the Broadcasting Board of Governors.

On February 13, 2006, plaintiff applied for another GS-13 IRB position under Vacancy Announcement No. M/P-06-27. *Id.* ¶ 7. Again she was deemed qualified and was interviewed for the position. *Id.* Again she was not selected for the position, which instead went to Timothee Donangmaye, a citizen of Chad. *Id.*

DISCUSSION

I. Standard of Review

Subject matter jurisdiction may be challenged at any time by the parties, the Court *sua sponte,* or on appeal. *Booth v. United States,* 990 F.2d 617, 620 (Fed. Cir. 1993). In considering defendant's motion to dismiss, the Court must construe the facts in the complaint in the light most favorable to plaintiff, *see Nw. Airlines v. Trans. Workers Union,* 451 U.S. 77, 81 n.3 (1981) (citing *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974)), and accept any undisputed allegations of fact as true. *See Reynolds v. Army and Air Force Exch. Serv.,* 846 F.2d 746, 747 (Fed. Cir. 1988).

Plaintiff is responsible for setting forth a jurisdictional basis for her claims. RCFC 8(a)(1) (the complaint must contain "a short and plain statement of the grounds upon which the court's jurisdiction depends."). "Determination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States,* 124 F.3d 1462, 1465 (Fed. Cir. 1997). "'The court should [then] look

to plaintiff's factual allegations to ascertain the true nature of the claims' as well as 'to matters outside the pleadings' in deciding whether or not it has jurisdiction." *Cottrell v. United States,* 42 Fed. Cl. 144, 148 (1998) (quoting *Lewis v. United States,* 32 Fed. Cl. 301, 304 (1994)). Plaintiff, however, bears the ultimate burden of establishing subject matter jurisdiction over her claim. *See Reynolds,* 846 F.2d at 747; *Burgess v. United States,* 20 Cl. Ct. 701, 703 (1990).

II. The Court Lacks Subject Matter Jurisdiction Over Plaintiff's Claim Because 22 U.S.C. § 1474(1) Is Not Reasonably Amenable to the Reading That It Is Money-Mandating

Like all federal courts, the United States Court of Federal Claims is a court of limited jurisdiction. *Phaidin v. United States,* 28 Fed. Cl. 231, 233 (1993); *Dynalectron Corp. v. United States,* 4 Cl. Ct. 424, 428 (1984). Absent congressional consent to entertain a claim against the United States, the Court lacks authority to grant relief. *See United States v. Testan,* 424 U.S. 392, 399 (1976); *United States v. Sherwood,* 312 U.S. 584, 586 (1941). Congressional consent to suit in the Court of Federal Claims, which thereby waives sovereign immunity, must be explicit and strictly construed. *United States v. Mitchell,* 445 U.S. 535, 538 (1980).

The Tucker Act, 28 U.S.C. § 1491(a)(1) (2000), constitutes a waiver of sovereign immunity. *United*

States v. Mitchell, 463 U.S. 206, 212 (1983). The Tucker Act grants the Court jurisdiction over claims for money damages against the United States founded upon the Constitution, a federal statute or regulation, or upon an express or implied contract with the United States.

The Tucker Act does not itself create a substantive right of action enforceable against the United States. *Testan,* 424 U.S. at 398. Plaintiff must therefore identify another source of law that creates the substantive right and demonstrate that such source of law mandates compensation. *Mitchell,* 463 U.S. at 216-17. The other source of law must be "reasonably amenable to the reading that it mandates a right of recovery in damages." *Doe v. United States,* 463 F.3d 1314, 1324 (Fed. Cir. 2006) (quoting *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472-73 (2003)). If the Court determines that the source of law identified by plaintiff meets the money-mandating test, it will "declare that it has jurisdiction over the cause, and shall then proceed with the case in the normal course." *Fisher v. United States,* 402 F.3d 1167, 1173 (Fed. Cir. 2005) (en banc). On the other hand, "[i]f the court's conclusion is that the source as alleged and pleaded is not money-mandating, the court shall so declare, and shall dismiss the cause for lack of jurisdiction, a Rule 12(b)(1) dismissal – the absence of a money-mandating source being fatal to the court's jurisdiction under the Tucker Act." *Id.*

Like the Tucker Act, the Back Pay Act, 5 U.S.C. § 5596 (2000), "does not, itself, provide a statutory

basis for invoking this Court's jurisdiction." *Sacco v. United States,* 63 Fed. Cl. 424, 428 (2004) (citing *United States v. Connolly,* 716 F.2d 882, 887 (Fed. Cir. 1983)). Rather, "[t]he Back Pay Act is merely derivative in application; it is not itself a jurisdictional statute." *Connolly,* 716 F.2d at 887. In order for this Court to have jurisdiction over plaintiff's claim, "some provision of law other than the Back Pay Act must first mandate, or at least be interpreted to mandate, money damages to an employee suffering an unjustified or unwarranted personnel action." *Sacco,* 63 Fed. Cl. at 428 (quoting *Walker v. United States,* 11 Cl. Ct. 77, 80 (1986)).

The Government argues that 22 U.S.C. § 1474(1) does not, on its face, mandate the payment of monetary damages in the event of a violation and, therefore, this Court does not have jurisdiction over the subject matter of plaintiff's claim.[5] Def.'s Mot. 6.

---

[5] The Government also argued in its motion to dismiss that the Merit Systems Protection Board ("MSPB") has exclusive jurisdiction over allegations that a federal agency engaged in a "prohibited personnel practice" within the meaning of the Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b) (2000). Def.'s Mot. 5-6. Plaintiff replied that: (1) she did not allege that BBG had engaged in a prohibited personnel practice, and (2) the MSPB does not have jurisdiction over claims arising from the violation of 22 U.S.C. § 1474(1), including her claim in this action. Pl.'s Opp'n 2-11 (citing, *inter alia, Worthington v. United States,* 168 F.3d 24, 26-27 (Fed. Cir. 1999)). Because the Court finds that it lacks jurisdiction to hear plaintiff's claim for damages founded upon defendant's alleged violation of 22 U.S.C. § 1474(1) on the ground that the statute is not money-mandating, the Court need not consider whether it lacks jurisdiction to hear plaintiff's claim because it is, in fact, a claim that BBG engaged in a

(Continued on following page)

Plaintiff argues that this Court has subject matter jurisdiction if a statute can be *fairly* interpreted as mandating compensation, as opposed to solely when the statute, on its face, mandates compensation. Pl.'s Opp'n 11-12. Plaintiff argues that, under 22 U.S.C. § 1474(1), the BBG had a duty to hire qualified citizens, rather than aliens, when a qualified citizen was available for the open position. Had the BBG not violated the statute, plaintiff argues, she would have been hired and would be entitled to be paid as a GS-13 federal employee. Therefore, plaintiff argues, the statute is money-mandating, and this Court has subject matter jurisdiction over her claim. Pl.'s Opp'n 12-14.[6]

Plaintiff concedes that the statute does not mandate the payment of monetary damages on its face, but argues that *United States v. White Mountain Apache Tribe,* 537 U.S. 465 (2003), requires the Government to show a "strong indication" that Congress

---

prohibited personnel practice – a claim over which the MSPB has exclusive jurisdiction.

[6] Plaintiff further argues that, if this Court holds that it lacks subject matter jurisdiction, "the Secretary [of State] will have been given the implicit ability to ignore the mandate of 22 U.S.C. § 1474(a)(1) with impunity." Pl.'s Opp'n 14. Plaintiff's assertion appears to be contradicted by the filing of an of an institutional grievance by the American Federation of Government Employees "alleging that the BBG have been violating on a routine and continuing basis 22 U.S.C. § 1474 by hiring non-U.S. citizens in spite of the existence of suitably qualified U.S. citizens." *Wada v. Tomlinson*, No. 03-1488, 2007 WL 1378516, at *39 n.19 (D.D.C. May 9, 2007) (internal quotations omitted).

intended that damages be precluded in the event the statute was violated, and that if the Government is unable to make this showing, the statute meets the "fair inference" standard. Pl.'s Opp'n 14 (quoting *White Mountain Apache Tribe*, 537 U.S. at 477).

Because 22 U.S.C. § 1474(1) is not facially money-mandating, the necessary inquiry becomes whether it is "reasonably amenable" to a reading that it gives plaintiff a right to monetary damages in the event of a violation, as alleged by plaintiff. *See Doe*, 463 F.3d at 1324. The Court finds that the statute is not reasonably amenable to such a reading. The statute provides:

> In carrying out the provisions of this Act, the Secretary, or any Government agency authorized to administer such provisions, may –
>
> > (1) employ, without regard to the civil service and classification laws, aliens within the United States and abroad for service in the United States relating to the translation or narration of colloquial speech in foreign languages or the preparation and production of foreign language programs when suitably qualified United States citizens are not available when job vacancies occur
> >
> > . . . .

22 U.S.C. § 1474(1). The statute provides for the hiring of aliens in the event that qualified United States citizens are not available to fill open positions.

Although plaintiff is correct that, had she been selected for the position at issue, she would have received a commensurate pay increase, the Supreme Court of the United States has "explicitly rejected the argument that 'the violation of any statute or regulation relating to federal employment automatically creates a cause of action against the United States for money damages.'" *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 739 (1982) (quoting *Testan*, 424 U.S. at 401).[7] There is nothing in the statute that persuades this Court that the statute is reasonably amenable to a reading that it mandates the payment of monetary damages in the event the Government hires an alien for a position of the type described when a qualified United States citizen is available.

Plaintiff relies upon the Supreme Court decision in *White Mountain Apache Tribe* in support of her argument that 22 U.S.C. § 1474(1) is money-mandating. While the Supreme Court held that a statute does not have to explicitly provide for monetary damages in order to be money-mandating, the facts of that case are very different from those presented here. The statute in that case provided that the Government held property in trust for the White

---

[7] Furthermore, this Court "cannot grant monetary relief for the loss of a position to which a federal employee has not been appointed." *Westover v. United States*, 71 Fed. Cl. 635, 640 (2006) (citing *Wienberg v. United States*, 425 F.2d 1244, 1251, 192 Ct. Cl. 24, 35 (1970)).

Mountain Apache Tribe. *White Mountain Apache Tribe,* 537 U.S. at 475. The Supreme Court found that, because of the trust relationship created by statute, the Government had a fiduciary responsibility to properly administer the trust property. *Id.* The Supreme Court based its decision that the statute in question was money-mandating on the fact that under "general trust law" the Government's fiduciary responsibility gave rise to a right in the beneficiary to recover damages in the event the trustee violated its fiduciary duty. *Id.* at 477. If an explicit provision of damages were necessary for a statute to be money-mandating, such a requirement "would read the trust relation out of Indian Tucker Act analysis; if a specific provision for damages is needed, a trust obligation and trust law are not." *Id.* In this case, however, plaintiff has not pointed to any body of law, such as general trust law, outside 22 U.S.C. § 1474(1) that, together with the statute, would support her assertion that 22 U.S.C. § 1474(1) is money-mandating.

Similarly, plaintiff's reliance on *Fisher* is misplaced. *Fisher* dealt with 10 U.S.C. § 1201 (2000), which, in certain circumstances, permits the Secretary of a military department to retire an active-duty service member by reason of physical disability. 10 U.S.C. § 1201(a). Under the statute, when the Secretary determines a service member is unfit for duty because of physical disability, under 10 U.S.C. § 1201 the service member is entitled to disability retirement pay. *Fisher,* 402 F.3d at 1175 (citing *Sawyer v. United States,* 930 F.2d 1577, 1580 (Fed. Cir.

1991)). The Court of Appeals held that, under the statute, the "Secretary has no discretion whether to pay out retirement funds once a disability is found qualifying." *Id.* at 1174. Therefore, the court held, the statute was money-mandating. *Id.* Here there is no mandate requiring the payment of damages upon a showing that defendant has violated 22 U.S.C. § 1474(1).

CONCLUSION

The statute that plaintiff contends defendant has violated is not reasonably amenable to the reading that it confers upon persons in plaintiff's position a right to money damages in the event the statute is violated. Thus, the statute is not money-mandating, and this Court lacks jurisdiction over plaintiff's claim. Accordingly, the Government's motion to dismiss under RCFC 12(b)(1) is GRANTED. The Clerk is directed to enter judgment dismissing plaintiff's complaint without prejudice.

IT IS SO ORDERED.

s/ George W. Miller
GEORGE W. MILLER
Judge

(2)

No. 08-1418

In the Supreme Court of the United States

CAMILLE GROSDIDIER, ET AL., PETITIONERS

v.

CHAIRMAN, BROADCASTING BOARD OF GOVERNORS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
WILLIAM KANTER
HOWARD S. SCHER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Civil Service Reform Act of 1978 (CSRA) is a comprehensive system that regulates virtually every aspect of federal employment and "prescribes in great detail the protections and remedies applicable * * *, including the availability of * * * judicial review." *United States* v. *Fausto*, 484 U.S. 439, 443 (1988).

The question presented is whether the CSRA precludes judicial review under generally applicable statutes of disputes concerning all employment-related matters, including those not defined as "prohibited personnel practices" or "adverse actions," unless such review is expressly authorized for federal employees by the CSRA itself or other federal statute.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Discussion 7
Conclusion 9

TABLE OF AUTHORITIES

Cases:

Broadway v. *Block*, 694 F.2d 979 (5th Cir. 1982) 7
Bush v. *Lucas*, 462 U.S. 367 (1983) 2
Carducci v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983) ... 2, 3, 6
Dugan v. *Ramsay*, 727 F.2d 192 (1st Cir. 1984) 8
Filebark v. *Department of Transp.*, 555 F.3d 1009 (D.C. Cir. 2009), petition for cert. pending, No. 08-1415 (filed May 14, 2009) 6, 8
Fornaro v. *James*, 416 F.3d 63 (D.C. Cir. 2005) 2, 6
Graham v. *Ashcroft*, 358 F.3d 931 (D.C. Cir.), cert. denied, 543 U.S. 872 (2004) 2, 6
Irizarry v. *United States*, 427 F.3d 76 (1st Cir. 2006) 8
Lehman v. *Morrissey*, 779 F.2d 526 (9th Cir. 1985) 2
Pinar v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985) 7
Romero v. *United States*, 38 F.3d 1204 (Fed. Cir. 1994) 8
Ryon v. *O'Neill*, 894 F.2d 199 (6th Cir. 1990) 7
Tiltti v. *Weise*, 155 F.3d 596 (2d Cir. 1998) 7
United States v. *Fausto*, 484 U.S. 439 (1988) 2, 3, 6
Veit v. *Heckler*, 746 F.2d 508 (9th Cir. 1984) 7

Case—Continued: Page

Weatherford v. *Dole*, 763 F.2d 392 (10th Cir. 1985) 7
Worthington v. *United States*, 168 F.3d 24 (Fed. Cir. 1999) 6, 7

Statutes:

Back Pay Act, 5 U.S.C. 5596 5
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 4
Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 3, 92 Stat. 1111 1
Tucker Act, 28 U.S.C. 1491(a)(1) 5, 6
5 U.S.C. 1204 3
5 U.S.C. 1211-1218 3
5 U.S.C. 1214(a)(1) 4
5 U.S.C. 1214(a)(1)(D) 4
5 U.S.C. 1214(a)(2) 4
5 U.S.C. 1214(a)(3) 4
5 U.S.C. 1214(b)(2) 4
5 U.S.C. 1214(c)(1) 4
5 U.S.C. 1221 3
5 U.S.C. 2301 3
5 U.S.C. 2301(b)(2) 3, 6
5 U.S.C. 2301(b)(8)(A) 3
5 U.S.C. 2301(b)(8)(A) 6
5 U.S.C. 2302(b)(1) 3
5 U.S.C. 2302(b)(2) 3
5 U.S.C. 2302(b)(6) 3, 6
5 U.S.C. 2302(b)(7) 3

Statutes—Continued: Page

5 U.S.C. 2302(b)(8) 3
5 U.S.C. 2302(b)(12) 3
5 U.S.C. 7121 3
5 U.S.C. 7122 3
5 U.S.C. 7123 3
5 U.S.C. 7701-7703 3
5 U.S.C. 7703(b)(1) 4
22 U.S.C. 1474 ..... 5, 6
22 U.S.C. 1474(1) 4, 5

In the Supreme Court of the United States

No. 08-1418

CAMILLE GROSDIDIER, ET AL., PETITIONERS

v.

CHAIRMAN, BROADCASTING BOARD OF GOVERNORS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 560 F.3d 495. The opinion of the district court (Pet. App. 8a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2009. The petition for a writ of certiorari was filed on May 14, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, § 3, 92 Stat. 1111, to replace a "patchwork system" of federal personnel law "with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests

of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U.S. 439, 445 (1988). The personnel system created by the CSRA provides a "comprehensive" scheme of protections and remedies for federal employment disputes, *id.* at 448, and "prescribes in great detail the protections and remedies applicable * * * , including the availability of * * * judicial review." *Id.* at 443. Because of its comprehensive nature, courts have routinely held that "Congress meant to limit the remedies of federal employees bringing claims closely intertwined with their conditions of employment to those remedies provided in the [CSRA]." *Lehman* v. *Morrissey*, 779 F.2d 526, 527-528 (9th Cir. 1985). See *Fornaro* v. *James*, 416 F.3d 63, 67 (D.C. Cir. 2005) ("what you get under the CSRA is what you get"); *Graham* v. *Ashcroft*, 358 F.3d 931, 933-936 (D.C. Cir.), cert. denied, 543 U.S. 872 (2004).

The CSRA is an "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983). It essentially creates a three-tiered system providing graduated procedural protections based on the seriousness of the personnel action at issue. Greatly simplified, the system provides as follows: (a) for "adverse actions"—*i.e.*, "major personnel actions specified in the statute"—the CSRA affords an explicit right of judicial review in the Federal Circuit "after extensive prior administrative proceedings," *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983) (Scalia, J.); (b) for specified "prohibited personnel practices"—*i.e.*, "personnel actions infected by particularly heinous motivations or disregard of law"—the system provides administrative mechanisms to be followed by

judicial review in the Federal Circuit under specified circumstances, *ibid.*; and (c) for remaining minor personnel matters involving bargaining-unit employees, the system provides a grievance procedure followed by binding arbitration and sharply limited judicial review in the courts of appeals, 5 U.S.C. 7121, 7122, and 7123; and for such matters involving non-bargaining unit employees, the CSRA generally limits review to a separate internal agency grievance mechanism.

Prohibited personnel practices are governed by Chapter 23 of Title 5, which "establishes the principles of the merit system of employment." *Fausto*, 484 U.S. at 446. The chapter broadly defines "prohibited personnel practices" to include "personnel action" involving discrimination on the basis of race, color, religion, sex, national origin, handicap, or political affiliation; coercion of political activity; nepotism; retaliation against whistleblowers; and violation of any law, rule or regulation implementing or directly concerning the merit system principles set forth in 5 U.S.C. 2301. 5 U.S.C. 2301(b)(2), 2302(b)(1), (2), (7), (8) and (12). The chapter also requires that employees be "protected against arbitrary action" and "receive fair and equitable treatment in all aspects of personnel management," and prohibits the granting of "any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment * * * for the purpose of improving or injuring the prospects of any particular person for employment." 5 U.S.C. 2301(b)(2) and (8)(A), 2302(b)(6).

The CSRA's enforcement provisions for prohibited personnel practices, see 5 U.S.C. 1204, 1211-1218, 1221, 7701-7703, direct employees who wish to challenge such practices to file a complaint with the Office of Special

Counsel (OSC), 5 U.S.C. 1214(a)(1) and (3). If OSC finds reasonable grounds to believe an employee was or is to be subjected to a prohibited personnel practice, it may seek remedial action from the agency and the Merit Systems Protection Board (MSPB). 5 U.S.C. 1214(b)(2). An employee may seek judicial review in the Federal Circuit of any adverse decision of the MSPB in any case in which OSC has sought corrective action from the MSPB. 5 U.S.C. 1214(c)(1), 7703(b)(1). When OSC decides not to seek remedial action from the MSPB, the CSRA generally does not provide for review of that decision. *Ibid.* OSC must, however, provide the employee with its proposed findings of fact and legal conclusions, an opportunity to comment on them, and a final statement concerning the disposition of the complaint. 5 U.S.C. 1214(a)(1)(D) and (2). The CSRA expressly preserves any right or remedy available to an employee under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and other anti-discrimination laws. 5 U.S.C. 2302(d).

2. Petitioners are United States citizens and employees of the Broadcasting Board of Governors (agency) who applied for promotions to various positions as international broadcasters. Although each petitioner was deemed qualified for the position being sought, in each instance the agency selected other individuals who were not citizens of the United States. The selected individuals were employed pursuant to 22 U.S.C. 1474(1), which authorizes the government to "employ, without regard to the civil service and classification laws, aliens within the United States and abroad for service in the United States relating to the * * * preparation and production of foreign language programs when suitably

qualified United States citizens are not available when job vacancies occur." *Ibid.*

3. In September 2006, petitioner Grosdidier filed suit against the United States in the Court of Federal Claims. Petitioner alleged that the agency had violated 22 U.S.C. 1474(1) by hiring non-citizens when "suitably qualified" citizens, such as herself, were available. Petitioner sought monetary relief under the Tucker Act, 28 U.S.C. 1491(a)(1), in the form of back pay under the Back Pay Act, 5 U.S.C. 5596. The court dismissed the action for lack of subject matter jurisdiction on the ground that Section 1474(1) did not mandate the payment of money damages. Pet. App. 10a, 18a-29a.

4. Petitioners subsequently filed the instant action, challenging the agency's promotion selections under the Administrative Procedure Act (APA) and seeking back pay. Petitioners again argued that the agency violated 22 U.S.C. 1474 by selecting non-citizens for positions for which petitioners were suitably qualified. Petitioners further sought to represent a class of United States citizens who claimed they had not been hired for other positions that were awarded to non-citizens because the agency allegedly interpreted its authority to hire non-citizens too broadly. Pet. App. 3a, 8a-12a.

The district court dismissed for lack of subject matter jurisdiction. The court found that petitioners' claim that the agency unlawfully denied them promotions by misapplying 22 U.S.C. 1474 alleged a prohibited personnel practice for which the CSRA provides the exclusive remedy. Pet. App. 15a-16a. The court reasoned that petitioners' claim that the agency acted arbitrarily and capriciously in violation of the statute by selecting non-citizens over equally qualified citizens alleged a prohibited personnel practice insofar as it implicates the merit

principles in 5 U.S.C. 2301(b)(8)(A) and (b)(2). Pet. App. 15a-16a. The court concluded that the allegations also amount to a prohibited personnel practice under 5 U.S.C. 2302(b)(6), which prohibits the granting of unlawful preferences in hiring. Pet. App. 15a-16a & n.5.

5. The court of appeals affirmed. Pet. 1a-7a. The court squarely rejected petitioners' contention that the CSRA "is not the exclusive avenue for covered federal employees to bring suits challenging personnel actions and that they may pursue their claim under the Administrative Procedure Act." *Id.* at 4a. Rather, the court held that the CSRA precludes judicial review of employment-related complaints unless such review is specifically authorized by the statute itself. See *id.* at 5a (citing *Fausto*, *supra*; *Filebark* v. *Department of Transp.*, 555 F.3d 1009, 1010 (D.C. Cir. 2009), petition for cert. pending, No. 08-1415 (filed May 14, 2009); *Fornaro*, 416 F.3d at 67; *Graham*, 58 F.3d at 933-936; and *Carducci*, 714 F.2d at 172). The court rejected petitioners' reliance on the Federal Circuit's decision in *Worthington* v. *United States*, 168 F.3d 24, 26-27 (1999), both because *Worthington* involved the Tucker Act rather than the APA, and, more importantly, because "*Worthington* * * * appears to be in significant tension with th[e] * * * precedents" of the D.C. Circuit. Pet. App. 6a.

Finally, the court rejected petitioners' reliance on 22 U.S.C. 1474(1), which allows the Voice of America to employ non-citizens "without regard to the civil service and classification laws." Section 1474, the court concluded, "has nothing to do with the question before us." Pet. App. 6a. That Section, the court found, merely "contemplates the hiring of non-citizens notwithstanding the usual prohibitions on such hiring, and without re-

gard to any limitations the civil service laws might place on that hiring." *Ibid.* "The statute does nothing to affect the exclusivity of the CSRA for suits targeting personnel decisions." *Id.* at 6a-7a.

DISCUSSION

Petitioners' sole contention is that the remedies provided in the CSRA are exclusive *only* as to employment matters that the CSRA defines as either a prohibited personnel practice or an adverse action. Petitioner correctly contends that the court of appeals' holding to the contrary—*i.e.*, that the CSRA precludes judicial review of all employment-related actions (unless such review is specifically permitted in the CSRA itself)—conflicts with the holdings of other courts of appeals. See Pet. 8-33; Pet. 14 ("The Federal Circuit has repeatedly construed the CSRA, and applied the decision in *Fausto*, only to preclude judicial review under other statutes of those personnel matters that *are* covered by the CSRA itself."). The issue petitioner asks the Court to review

---

The court of appeals' determination that the CSRA precludes judicial review of all employment-related claims, including claims that are neither "prohibited personnel practices" nor "adverse actions" unless such review is specifically provided for federal employees in the CSRA or elsewhere, is consistent with decisions from the Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits. *E.g.*, *Tiltti* v. *Weise*, 155 F.3d 596, 600-601 (2d Cir. 1998); *Pinar* v. *Dole*, 747 F.2d 899, 912 913 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); *Broadway* v. *Block*, 694 F.2d 979, 981-986 (5th Cir. 1982); *Ryon* v. *O'Neill*, 894 F.2d 199, 201-204 (6th Cir. 1990); *Veit* v. *Heckler*, 746 F.2d 508, 511 (9th Cir. 1984); *Weatherford* v. *Dole*, 763 F.2d 392, 393-394 (10th Cir. 1985). The decision conflicts, however, with the narrower rule applied in the Federal and First Circuits, which have held that the CSRA does not bar judicial review of an employment-related decision that is not governed by the CSRA provisions covering prohibited personnel practices and adverse actions. *E.g.*, *Worthington* v. *United States*, 168 F.3d 24, 26-27 (Fed.

is squarely presented in the petition for a writ of certiorari filed in *Filebark* v. *Department of Transportation*, No. 08-1415 (filed May 14, 2009). The United States is filing a brief in that case concurrently with the filing of this brief and agrees that a writ of certiorari should be granted in *Filebark*. Resolution of the issues presented in *Filebark* will control the issue regarding judicial review presented in this case as well. The Court should therefore hold the petition in this case pending the disposition of the petition in *Filebark* or, for the following reasons, deny the petition in this case.

The instant case does not appear to be an appropriate vehicle for resolution of whether the CSRA precludes judicial review of employment-related claims that are not defined by the CSRA as either prohibited personnel practices or adverse actions. The district court held (Pet. App. 14a-17a) that petitioners' claims allege prohibited personnel practices under the CSRA because they describe violations of merit principles. And, as the district court held, the CSRA *does* provide a remedy (including judicial review in some instances) for such claims. *Ibid.* Thus, even under petitioners' theory that the CSRA does not preclude judicial review of matters that are neither prohibited personnel practices nor adverse actions, see Pet. 14-25, the CSRA would preclude judicial review of petitioners' APA claims. The court of appeals did not rely on the district court's conclusion that plaintiffs' claims allege prohibited personnel prac-

---

Cir. 1999); *Romero* v. *United States*, 38 F.3d 1204, 1211 (Fed. Cir. 1994); *Dugan* v. *Ramsay*, 727 F.2d 192, 194-195 (1st Cir. 1984); but see *Irizarry* v. *United States*, 427 F.3d 76, 78 n.2 (1st Cir. 2006) (noting, but not deciding, that *Dugan* may be inconsistent with this Court's later decision in *Fausto*).

tices under the CSRA, and petitioner does not challenge that conclusion before this Court.

Petitioners recognize the narrower reach of the district court's decision, but seek to take advantage of the "broader grounds," Pet. 7, inherent in the court of appeals' reliance on prior circuit holdings that "the CSRA is comprehensive and exclusive," Pet. App. 5a. Nevertheless, a ruling by the Court in petitioners' favor on the broad issue they present would not appear to permit the judicial review they seek. Accordingly, because this case does not cleanly present any issues that are not already the subject of the petition in *Filebark*, at this time review of the court of appeals' decision is not merited.

CONCLUSION

The petition for a writ of certiorari should be either held pending this Court's decision in *Filebark* v. *Department of Transportation*, No. 08-1415, and then disposed of accordingly, or denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
WILLIAM KANTER
HOWARD S. SCHER
Attorneys

SEPTEMBER 2009

142

(3) (3)

Nos. 08-1415 and 08-1418

Supreme Court, U.S.
FILED
OCT 6 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSEPH J. FILEBARK, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION and FEDERAL AVIATION ADMINISTRATION,

Respondents.

CAMILLE GROSDIDIER, *et al.*,

Petitioners,

v.

CHAIRMAN, BROADCASTING BOARD OF GOVERNORS,

Respondent.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' REPLY BRIEF

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

**Counsel of Record for Petitioners Filebark, et al. and Petitioners Grosdidier, et al.*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

GEORGE M. CHUZI
KALIJARVI, CHUZI &
NEWMAN, PC
1901 L Street, N.W.
Suite 610
Washington, D.C. 20036
(202) 331-9260

Counsel for Petitioners
Filebark, et al.

LESLIE D. ALDERMAN, III
ALDERMAN, DEVORSETZ &
HORA PLLC
1025 Connecticut Ave.
Suite 615
Washington, D.C. 20036
(202) 969-8220

Counsel for Petitioners
Grosdidier, et al.

TABLE OF CONTENTS

Page

I. These Cases Present An Important and Well-Established Inter-Circuit Conflict 1

II. Review Should Be Granted In Both *Filebark* and *Grosdidier* 5

Conclusion..... 13

TABLE OF AUTHORITIES

Page

CASES

Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983) 2

Fornaro v. James, 416 F.3d 63 (D.C. Cir. 2005) 2

Romero v. United States, 38 F.3d 1204 (Fed. Cir. 1994) 4

United States v. Fausto, 484 U.S. 439 (1988) 8

Worthington v. United States, 168 F.3d 24 (Fed. Cir. 1999) 4

STATUTES AND RULES

49 U.S.C. § 40122(g)(3) 8

Administrative Procedure Act 3, 4, 5

DOT Act 7

Civil Service Reform Act ..... *passim*

Civil Service Reform Act Chapter 23 8

Supreme Court Rule 27.3 11

OTHER AUTHORITIES

Appellants' Brief, Grosdidier v. Glassman, No. 08-5181 (D.C. Cir.) 9

The petitions in No. 08-1415, *Filebark v. Department of Transportation*, and No. 08-1418, *Grosdidier v. Chairman, Broadcasting Board of Governors*, pose the same question presented. For the reasons set out below, the Court should grant certiorari in both cases and consolidate them for briefing and argument.

I. THESE CASES PRESENT AN IMPORTANT AND WELL-ESTABLISHED INTER-CIRCUIT CONFLICT

The United States correctly describes the decisions of the court of appeals in both *Filebark* and *Grosdidier* as holding that the "CSRA precludes judicial review of all employment-related actions (unless judicial review is specifically permitted in the CSRA itself)." (Grosdidier R. Br. at 7; see Filebark R. Br. at 12). That holding, the government observes, is in conflict with decisions in the Federal and First Circuits. (Grosdidier R. Br. at 7 and n.8; Filebark R. Br. at 12, 13 n.5). The government's recognition of the existence of this inter-circuit conflict reflects not only a sound reading of the decisions involved, but also the extensive practical experience of the Department of Justice in litigating scores of federal employee claims under the divergent standards applied by the various courts of appeals.

The Federal Circuit holds that the CSRA precludes judicial review only of claims that concern a type of employment practice specifically addressed by the CSRA itself, such as disciplinary action. The

Federal Circuit's limited preclusion rule would not apply to the claim in *Filebark* (which concerns the proper classification of an entire facility) or *Grosdidier* (which concerns a statute that entitles suitably qualified citizens to be promoted ahead of more qualified aliens). The NTEU[1] disputes the government's characterization of the breadth of the D.C. Circuit preclusion standard, but does not assert that the Federal Circuit would hold that claims in *Filebark* and *Grosdidier* are barred by the CSRA.

The NTEU suggests that the D.C. Circuit holds only that the CSRA bars judicial review of non-CSRA employment-related claims where "Congress' intent to proscribe review is 'fairly discernable' in the CSRA's scheme." (NTEU Br. at 9). But that circuit's caselaw gives a sweeping preclusive effect to the CSRA because the D.C. Circuit insists that an intent to proscribe review is discernable with regard to *all* federal employment-related claims.[2] Similarly, the

---

[1] For simplicity we refer to the union amici in this case as the NTEU, and cite the Brief for the National Treasury Employees Union and American Federation of Government Employees, AFL-CIO, as "NTEU Br."

[2] *Fornaro v. James*, 416 F.3d 63, 67 (D.C. Cir. 2005):

> We ... concluded in *Carducci v. Regan*, 714 F.2d 171, 174-75 (D.C. Cir. 1983), that no remedy was available under the APA for an employment claim as to which the CSRA provided no relief. As we explained, that "failure to include" any relief "within the remedial scheme of so comprehensive a piece of legislation reflects a congressional intent that no judicial relief be available."

(*quoting Carducci v. Regan*, 714 F.2d 171, 174 (D.C. Cir. 1983)).

union urges that all circuits agree on "the unremarkable proposition that the CSRA precludes review of claims that fall within its scope." (NTEU Br. at 15-16). But the courts of appeals disagree about what claims do fall within the scope of the CSRA. The D.C. Circuit insists that all employment-related claims (or at least all claims involving agency personnel actions) fall within the scope of the CSRA; the Federal Circuit, on the other hand, holds that only claims regarding the particular practices expressly addressed in the CSRA fall within the scope of the CSRA.

The NTEU asserts that

> the court below [in *Filebark*] explicitly recognized in its decision that federal employees could pursue claims in court that are grounded on a "source of law" that is "independent" of the CSRA.

(NTEU Br. at 8, *quoting* Filebark Pet. App. 7a). The court of appeals did not so hold. The court of appeals stated that the existence of a "source of law" "independent" of the CSRA is necessary, but not that it is sufficient. The APA *is* just such a source of law, independent of the CSRA, authorizing judicial review of government actions. The court of appeals nonetheless rejected the plaintiffs' claims, holding that employment-related claims under the APA (claims which presumably would have been viable prior to the adoption of the CSRA) are precluded by the CSRA.

> [T]he employees ... must point to an independent source of law in order to maintain this action.... [T]he only basis for a cause of action... is the APA.... [T]he case ... begins and ends with the question ... "whether ... *the CSRA as a whole* ... removes the jurisdiction given to the federal courts or otherwise precludes employees from pursuing" a claim under the APA....

(Filebark Pet. App. 7a) (emphasis in original).

The NTEU suggests that the District of Columbia Circuit construes the CSRA to preclude, not all claims in any way related to federal employment, but only claims about agency personnel actions. (NTEU Br. at 9, 11, 15). Even if that were the case, the D.C. Circuit standard would still conflict with the decisions in the Federal Circuit. The Federal Circuit has repeatedly rejected arguments by the United States that the CSRA precludes review under any other statute of claims regarding agency personnel actions. *Worthington v. United States*, 168 F.3d 24, 26-27 (Fed. Cir. 1999); *Romero v. United States*, 38 F.3d 1204, 1211 (Fed. Cir. 1994).

The D.C. Circuit preclusion standard, moreover, cannot be as limited as the NTEU suggests. The claim in *Filebark* itself – which the D.C. Circuit held precluded by the CSRA – did not involve an agency "personnel action," as that phrase would normally be understood. The agency in *Filebark* had not taken action directed at the employment status or benefits of a particular federal worker; rather, the disputed practice was the failure of the agency to alter the

classification of an air traffic control facility. The NTEU itself describes the broad preclusion standard in the Ninth, Tenth and Eleventh Circuits as barring not only claims regarding agency personnel actions, but more broadly "state tort claims *related to* employment." (NTEU Br. at 15 n.14; see *id.* at 15) (emphasis added). The union acknowledges that the D.C. Circuit itself characterizes its own standard as precluding "federal employee claims." (NTEU Br. at 11). The decisions below articulated the D.C. Circuit standard in just such all-inclusive terms. (Filebark Pet. App. 11a; Grosdidier Pet. App. 5a, 7a).

II. REVIEW SHOULD BE GRANTED IN BOTH *FILEBARK* AND *GROSDIDIER*

A. We agree with the United States that the court of appeals decision in *Filebark* is an appropriate vehicle for resolving the question presented.

The court of appeals decision in *Filebark* rests on that circuit's view of the general preclusive effect of the CSRA. The United States correctly describes the circuit court's opinion as holding that

> petitioners could not pursue their claims under the APA ... because the CSRA precludes federal employees from seeking redress for employment-related claims through a judicial remedy unless such

> remedy is specifically permitted in the CSRA.[3]

The NTEU does not deny that the court of appeals decision was based on the D.C. Circuit's well-established CSRA preclusion standard.

The NTEU nonetheless argues that *Filebark* is not an appropriate vehicle for resolving the dispute about the preclusive effect of the CSRA, even though CSRA preclusion was the actual basis of the court of appeals decision, because the *district court* concluded that there was a separate basis for refusing to consider the claims of the plaintiffs in *Filebark*. (NTEU Br. at 6-8). The district court held that, regardless of whether the CSRA precluded consideration of the plaintiffs' claims, judicial review of those claims was barred by the terms of the Department of Transportation Act. (Filebark Pet. App. at 43a). The union does not contend that the court of appeals itself ever addressed that alternative basis for rejecting the complaint.

Filebark thus presents the common situation in which a court of appeals has ruled for the respondent on one ground, without addressing other alternative arguments advanced by that party. This Court routinely grants certiorari in such cases; if the petitioner prevails on the question presented, the case is then routinely remanded to the lower courts for further consideration of any remaining claims or defenses of

---

[3] Filebark R. Br. at 10.

the respondent. The NTEU offers no reason why that well-established practice should not be followed in the instant case.

The NTEU asserts that "the relevant ... question presented by this case is whether petitioners' claims are precluded by the DOT Act." (NTEU Br. at 7). But that is precisely the alternative ground which the court of appeals did *not* address. A certiorari petition could not properly have presented a question about the preclusive effect of the DOT Act, because that issue was never decided by the court of appeals below. If this Court, addressing the CSRA issue that was decided by the court of appeals, holds that the CSRA does not by itself preclude petitioners' claims, the court of appeals on remand will be free to resolve, as it did not in its earlier opinion, whether the DOT Act may have such a preclusive effect.

The NTEU similarly errs when it asserts that "[t]here is ... no need for this Court to address the question of whether the CSRA precludes petitioners' claims." (*Id.* at 7). To the contrary, that is the only question which the Court needs to, or even should address, because that is the question which was decided by the court below. Resolution of that question regarding the preclusive scope of the CSRA would be unnecessary only if the court of appeals, in addition to rejecting petitioners' claims on the basis of CSRA preclusion, had also rejected those claims on the alternative ground – relied on by the district court – that those claims are barred by the DOT Act. But the NTEU does not suggest that the court of appeals ever decided the latter issue.

The judicial review provisions of the CSRA are expressly applicable to employees at the FAA. 49 U.S.C. § 40122(g)(3). The D.C. Circuit thus understandably concluded that it was appropriate "to apply our [CSRA] preclusion cases to employees of [the FAA]." (Filebark Pet. App. at 10a). There are, of course, differences between some internal practices (such as salary scales) at the FAA and at other agencies. But as this Court made clear in *United States v. Fausto*, 484 U.S. 439, 448-49 (1988), any argument that the CSRA precludes judicial review under some other statute necessarily turns on the scope of, and exclusions from, the judicial review provisions of the CSRA itself. Thus *Filebark* is an appropriate vehicle for determining the preclusive effect of the judicial review provisions of the CSRA, which apply to the FAA just as they do to other federal agencies.

B. The court of appeals decision in *Grosdidier* is also an appropriate vehicle for resolving the question presented.

The court of appeals held that the claims of the *Grosdidier* plaintiffs were barred by the broad preclusive effect of the CSRA. The district court had rejected those claims on a different basis. The district court instead accepted the government's contention that the plaintiffs were actually claiming that they had been denied promotions in favor of less qualified applicants, a practice that could violate Chapter 23 of the CSRA. That characterization of plaintiffs' claims, if correct, could bar review of those claims under the APA; violations of the CSRA are only subject to

judicial review under the CSRA itself. On appeal the plaintiffs challenged that holding.[4] Rather than address that issue, however, the court of appeals held that the *Grosdidier* claims – regardless of whether (as the plaintiffs contended) those claims fell outside the prohibitions of the CSRA – were precluded by the CSRA.

The government acknowledges that the court of appeals "did not rely on the district court's conclusion" that the plaintiffs' claims would constitute a violation of the CSRA. (Grosdidier R. Br. at 8). It nonetheless urges that the existence of this unresolved dispute regarding the correctness of the district court's reasoning makes this case an unsuitable vehicle for resolving the distinct question of law, regarding the CSRA, which was in fact the sole basis of the court of appeals decision.

The United States suggests that *Grosdidier* is not an appropriate vehicle to review the court of appeals decision regarding the preclusive effect of the CSRA because the "petitioner does not challenge ... before this Court" the district court's holding that the claims of the Grosdidier petitioners were barred because they asserted a violation of the CSRA. (Grosdidier R. Br. 9). But it would have been entirely premature and inappropriate for petitioners to challenge in this Court a holding of the district court which has never been passed on by the court of appeals. At this point

---

[4] Appellants' Brief, Grosdidier v. Glassman, No. 08-5181 (D.C. Cir.) at 17-21.

in the litigation this Court would not consider a challenge to an as yet unreviewed holding of the district court. The government does not suggest that the Grosdidier petitioners in the court of appeals failed to challenge – and thus waived any objection to – that holding of the district court on this issue. To the contrary, in the court of appeals the Grosdidier petitioners emphatically sought reversal of that district court decision.

The government suggests that "a ruling by the Court in petitioners' favor on the broad issue they present [regarding the preclusive effect of the CSRA] *would not appear* to permit the judicial review they seek." (Grosdidier R. Br. at 9) (emphasis added). But the Solicitor General is not suggesting that the court of appeals has already addressed and resolved (in the government's favor) the alternative defense argument relied on by the district court. Nor is the Solicitor General indicating that the government will ask this Court to consider that record-bound contention – which the court of appeals itself never passed on – as an alternative basis for affirmance. Rather, this passage is simply a prediction that it "appear[s]" that on remand the government will ultimately prevail on this alternative ground. The United States offers no explanation as to why it "would ... appear" that the government will prevail on that issue on remand, and circumspectly neither defends nor even describes the rationale of the district court opinion.

There is substantial reason to doubt that this holding of the district court would be upheld by the court of appeals on remand. But the disposition of the

petition in *Grosdidier* does not require this Court to foresee the outcome of such a hypothetical remand. In determining whether to grant review of a question of law decided by a court of appeals, this Court does not undertake to determine the merits of other questions which that lower court did not resolve, or to predict which party would prevail on those issues were they to be addressed by the lower courts at some subsequent point in the litigation.

C. The Court should grant certiorari in both *Filebark* and *Grosdidier*, and consolidate those cases for briefing and argument pursuant to Rule 27.3 of this Court.

A grant of review in both cases will assure that the Court can resolve the underlying question regarding the general preclusive effect of the CSRA. The parties in these cases each advance interpretations of the CSRA which – if adopted by this Court – would be equally dispositive of the preclusion issue in both *Filebark* and *Grosdidier*. Petitioners contend that the CSRA never precludes claims regarding employment matters not specifically addressed in the CSRA; the government argues that the CSRA always has such a preclusive effect. If the permissible interpretations of the CSRA were limited to these two per se rules, the question presented would necessarily be resolved by a decision in either case. But it is possible that an amicus will propose, or that the Court itself will suggest, a view of the law under which one of these cases could be resolved on a narrower ground, without reaching the broader issue regarding the general preclusive effect of the CSRA. Should the

Court grant review in only one of the cases, and then decide it on such a narrower ground, the underlying inter-circuit conflict would remain unresolved. It would then be necessary to grant review in the second, or some other, case. The risk of the ensuing delay, and the resulting inefficient use of this Court's scarce resources, would be significantly reduced if certiorari were granted in both cases.

This Court's assessment of the question presented would be facilitated by considering that question in the context of the different types of claims presented by *Filebark* and *Grosdidier*. The substantive claim in *Grosdidier* is based on a federal statute, whereas the claims in *Filebark* rest on a collective bargaining agreement and an administrative directive. The plaintiffs in *Grosdidier* seek promotions based on asserted violations of rights in particular individual cases; the plaintiffs in *Filebark* challenge a facility classification decision that affects the salaries of a substantial group of federal workers at that facility. A grant of review in both cases would permit a fuller understanding of the practical implications of the question presented, and would allow the Court to consider whether the preclusive effect of the CSRA should turn on the types of differences presented by the two cases.

Consolidation of these cases will not entail any additional burden on the parties, because the counsel of record in *Filebark* and *Grosdidier* are the same.

CONCLUSION

For the above reasons, certiorari should be granted in No. 08-1415 and No. 08-1418, and the cases should be consolidated for briefing and argument.

Respectfully submitted,

ERIC SCHNAPPER
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Counsel of Record for Petitioners Filebark, et al. and Petitioners Grosdidier, et al.

GEORGE M. CHUZI
KALIJARVI, CHUZI & NEWMAN, PC
1901 L Street, N.W.
Suite 610
Washington, D.C. 20036
(202) 331-9260

Counsel for Petitioners Filebark, et al.

LESLIE D. ALDERMAN, III
ALDERMAN, DEVORSETZ & HORA PLLC
1025 Connecticut Ave.
Suite 615
Washington, D.C. 20036
(202) 969-8220

Counsel for Petitioners Grosdidier, et al.